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No. 886

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,226

FARBENFABRIKEN BAYER A. G., *Appellant*

v.

STERLING DRUG, INC., *Appellee*

On Appeal from a Judgment of the United States District Court for the District of New Jersey

APPENDIX FOR APPELLANT FARBENFABRIKEN BAYER A. G.

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APPENDIX

Docket Entries

Civil 909-55

Date	Filings—Proceedings
9-28-55	Complaint, filed.
9-28-55	Summons issued.
9-28-55	Notice of Allocation and assignment, filed (Newark-Smith).
10-5-55	Summons returned served on 9-30-55, filed 10-4-55.
11-1-55	Plaintiff's motion to vacate defendant's notice of depositions and to establish procedure for taking depositions, filed.
11-4-55	Stipulation and order extending time to answer to 11-21-55, filed 11-3-55 (Smith) Notice mailed.
11-7-55	Notice of motion by plaintiff to vacate defendant's notice of depositions and to establish procedure for taking depositions, and acknowledgement of service, filed (ret. 11-14-55) (No brief submitted).
11-14-55	Order to Show Cause re transfer of action to Southern District of New York or in the alternative to dismiss complaint ret. 12-12-55; staying further proceedings pending determination of motion, filed 11-14-55 (Smith) Notice mailed. (See C. 908-55).
11-17-55	Affidavit of service of copy of order to show cause, filed 11-16-55 (See C. 908-55).
12-7-55	Affidavit of Thurman Arnold in opposition to defendant's motions to transfer or dismiss, filed 12-6-55.
12-9-55	Affidavit of John T. Cahill, filed 12-8-55 (See 908-55).

12-13-55—Ordered plaintiff's motions to vacate defendant's notice of depositions and to establish procedure for taking depositions held in abeyance. (Smith) (12-12-55).

12-13-55—Hearing on order to show cause re transfer of action to Southern District of New York or in the alternative to dismiss complaint. Decision Reserved. (Smith) (12-12-55).

12-13-55—Reply affidavit of John T. Cahill, filed 12-12-55 (See C. 908-55).

3-16-56—Order denying application to transfer action to Southern District of New York, filed 3-15-56 (Smith) Notice mailed (See C. 908-56).

3-19-56—Answer, filed 3-16-56.

3-23-56—Affidavit of service of copy of answer filed.

3-27-56—Order to show cause re entry of summary judgment for defendant; and staying proceedings, filed 3-26-56 (Smith) Notice mailed. (ret. 5-14-56) (See C. 908-55).

3-29-56—Affidavit of service of order to show cause, filed. (See Civ. 908-55).

5-9-56—Substitution of Attorneys, filed 5-8-56.

6-12-56—Hearing on application re: entry of summary judgment, for defendant. Decision Reserved. (Smith) (6-11-56).

6-13-56—Order suspending Rule 19 for completion of discovery until further order of Court, filed 6-11-56 (Smith) Notice mailed.

9-19-56—Transcript of hearings held on Dec. 12, 1955, filed 9-18-56 (See C. 908-55).

9-19-56—Transcript of hearing held on June 11, 1956, filed 9-18-56 (See C. 908-55).

2-6-57—Opinion filed 2-5-57. (Smith) (Motion for summary judgment denied) (dismissing action without prejudice).

Complaint

3-5-57—Order denying motion for Summary Judgment and dismissing action with costs in favor of the defendant, Sterling Drug, Inc. and against the plaintiff, Farbenfabriken Bayer, A. G., a corporation, filed 3-4-57. (Smith) Notice mailed.

3-5-57—Statement of Defendant's costs taxed at $20.00, filed.

3-7-57—Notice of Appeal filed 3-5-57.

3-7-57—Copies forwarded to Clerk, USAC and to Atty. for Deft.

3-7-57—Bond on Appeal filed.

Complaint for Accounting and Other Relief Arising Out of Contract

1. Plaintiff Farbenfabriken Bayer A.G. is a corporation organized under the laws of Germany, with its principal offices and factory at Leverkusen, Germany. The plaintiff is engaged among other things in the manufacture and distribution of drugs and pharmaceuticals of all kinds and the export of such drugs and pharmaceuticals.

2. Defendant Sterling Drug, Inc. is a corporation organized under the laws of the State of Delaware. It is engaged in the manufacture, sale and distribution of drugs and pharmaceuticals directly and through subsidiaries in the United States and in various other parts of the world.

3. The defendant maintains offices and manufacturing facilities and transacts business within the District of New Jersey.

4. Jurisdiction of this Court is invoked under 28 U.S.C. §1332(a)(2). The matter in controversy exceeds the required amount exclusive of interest and costs.

5. Farbenfabriken Bayer A.G. is the legal successor to Farbenfabriken vorm. Friedrich Bayer & Co. of Leverkusen, Germany with respect to all relevant matters re-

ferred to herein. The term "Bayer" used herein means the plaintiff or its predecessor in existence at the particular time.

6. The defendant is the legal successor to a number of predecessor companies including The Bayer Co., Inc. of New York. "Sterling" hereinafter means the present company or its predecessor in existence at the particular time.

For a First Cause of Action

7. The plaintiff corporation is the successor of the firm of Friedrich Bayer & Co. founded at Elberfeld, Germany, in 1863, the name of which was changed in 1881 to Farbenfabriken vorm. Friedrich Bayer & Co. About 1900 the principal manufacturing activities were transferred to a new plant at Leverkusen, Germany and in 1912 the main offices of the company were also transferred to Leverkusen. Plaintiff and its predecessors have for many years engaged in the manufacture of pharmaceutical preparations. Its research developed the revolutionary drug Aspirin, for many years and still the world's most widely used single drug, and many other great discoveries including the sulfa drugs. Its products were sold throughout the world under the name Bayer and by the use of various trademarks, the most famous of which is the so-called Bayer Cross which consists of the name Bayer spelled in cross fashion horizontally and vertically in a circular background.

8. Beginning in 1895 Bayer formed a subsidiary company in the United States under the name of Farbenfabriken of Elberfeld Company, later reincorporated as the Bayer Co., Inc. of New York. This company had manufacturing facilities at Rensselaer, New York, and conducted its business under the name of Bayer and with the use of trade names and trademarks associated in the public mind with the parent company. Its most widely used and advertised product was Bayer Aspirin. This was identified by the name

Bayer, the Bayer Cross and the name Aspirin (until sometime after the First World War, "Aspirin" was a valid trademark in the United States). The word "Aspirin" or "Aspirin products" as used hereinafter mean not only acetylsalicylic acid but also various compounds thereof.

9. In Latin America the parent Bayer Company through various subsidiaries sold Bayer Aspirin and Aspirin compounds inter alia, under the name, Bayer and under the Bayer Cross.

10. During the First World War the United States Alien Property Custodian seized all the assets of the plaintiff in the United States and sold them to Sterling Products (Incorporated), a predecessor corporation of the defendant.

11. By this purchase from the Alien Property Custodian, Sterling obtained control in the United States of the trademark Bayer, of the Bayer Cross, and of the name Aspirin as well as a number of other valuable trademarks and trade names.

12. The New York Corporation seized by the Alien Property Custodian had no trademark rights in Latin America to the name Bayer, the Bayer Cross or the various Aspirin trade names. However, it was discovered that in a number of Latin American countries, important trademarks of Bayer were about to lapse and required renewal. It was also discovered that in some countries Bayer had sold its products under these names but had not registered the marks. Sterling knew that Bayer was in a weak and defenseless position as a result of the defeat of Germany in World War I, and that the currency of Germany was weak and rapidly becoming weaker. Taking advantage of this weakness, Sterling aggressively intervened in various Latin American countries to take over for itself the rights belonging to Bayer. Sterling entered every possible area. By this means Sterling succeeded in obtaining for itself the registration of the name Bayer, the Bayer Cross and vari-

ous Aspirin trademarks among others in such countries as Mexico, Paraguay, Bolivia, Nicaragua, Honduras, Panama, etc.

13. By these means, Sterling put Bayer under a serious competitive disadvantage with respect to the Latin American market. To obtain the return of its trademarks in Latin America would have required lengthy and expensive litigation in various countries. The burden was one which the economic situation of Bayer and Germany in general rendered most difficult if not impossible. To get back its trademarks Bayer had to come to terms with Sterling. The general manager of Sterling came to Europe and pressed Bayer to negotiate the matters. Bayer had no choice but to accept Sterling's invitation and a series of conferences were held in Europe commencing in the summer and fall of 1919. Sterling limited the discussions to the Latin American trade and to the trade in Aspirin and its compounds there. Under these circumstances Bayer in 1920 reluctantly agreed to enter into a joint enterprise with Sterling for a period of 50 years in the sale of Aspirin products in Latin America. This agreement provided in substance that Bayer for the return of its trademarks would give up 25% of the profits of the Latin American business for 50 years. Thus Sterling, by aggressive registration in various countries of Bayer's trademarks and trade names and by taking advantage of the weak post-war position of Bayer, obtained for itself a 25% participation for 50 years in a business which had been exclusively the property of Leverkusen.

14. This agreement was concluded in Germany in October 1920 and signed by both parties subject to ratification by the American company's home office. It was duly ratified in November 1920. Under the agreement Aspirin products in Latin America were to be sold under the Bayer name and the Bayer trademarks but the business was to be conducted by Sterling, using as distributors, where

possible, the Bayer subsidiaries in Latin America: 75% of the profits were to go to Bayer and 25% to Sterling. A copy of the agreement hereinafter referred to as the "Latin American Aspirin Agreement" or the "1920 Agreement" is attached as Exhibit A to this complaint.

15. The 1920 agreement was limited exclusively to the Latin American business. It concerned only Aspirin and Aspirin compounds, except that in 1935 a general tonic called Tonico Bayer was included in the agreement. The agreement did not cover any other pharmaceuticals. Sterling handled its other pharmaceuticals in Latin America independently of Bayer and under its own trade names through subsidiaries in the various countries. Bayer handled its other pharmaceuticals through its own subsidiaries using the name Bayer and the Bayer Cross.

16. The agreement was carried out by both parties for approximately 20 years. The joint venture, building on the enterprise previously conducted by Bayer alone, developed a large and profitable business in Latin America. It had channels of distribution, a large public acceptance, and favorable relations with its customers, all constituting a valuable goodwill, as well as the Bayer trademarks. Bayer, having cheaper manufacturing costs, delivered products covered by the contract during all the years from 1920 to 1939. At that time, delivery from Europe became difficult because of the war. Accordingly, as provided in the contract in such case, Sterling then assumed deliveries from its facilities in the United States.

17. The Latin American distribution agencies were, in general, subsidiaries of Bayer. In 1941, Sterling insisted that because of the international situation, distribution should be transferred to subsidiaries of Sterling in each of the Latin American countries. This was in fact done in the spring and summer of 1941, and the entire joint business in Latin America was thus entrusted by Bayer to Sterling and its subsidiaries.

18. Payments had been made to Bayer under the contract at least through the year 1939. Although Sterling continued to perform under the contract through the summer of 1941, it has made no accounting, or payment of the profits of the joint enterprise for the year 1941 and on information and belief some payments on account of 1940 were not made.

19. The Bayer share of the profits for the year 1941 is believed to be at least $500,000 although the exact amount is not known. The amount which has not been paid for the year 1940 is not known.

20. The sums in question were never vested by the Alien Property Custodian.

Wherefore, plaintiff prays for an accounting of the profits of the joint Latin American business under the 1920 contract for the years 1940 and 1941 and payment to it of the amounts so allowed, and for such other and further relief as to the Court seems just.

For a Second Cause of Action

21. Plaintiff repeats the allegations of paragraphs 1 to 20.

22. In August 1941, Sterling requested a termination of the joint Latin American business enterprise "while conditions still permit our doing so on a negotiated basis". It declared its desire to dissolve all contracts, agreements, understandings and partnerships and to divide jointly held property and to terminate all obligations and rights resulting from the Latin American agreement. Despite threats from Sterling that force majeure might destroy the Latin American business, Bayer refused, and insisted that the agreements could not be terminated.

23. On information and belief Sterling had at this time already formulated a plan to appropriate to itself the

Latin American Aspirin market and to exclude Bayer. To this end it used the fact that the entire business had been entrusted to it by the transactions in the spring and summer of 1941 as described in 17 above.

24. It thus had complete control of the Latin American business which had been created and developed by Bayer and thereafter had been further carried forward by 20 years of joint effort. Sterling used the good will of the joint enterprise, its distribution methods, its customers lists and all its other valuable assets exclusively for its own benefit. This it did in the following manner: It introduced into the Latin American market a substitute Aspirin preparation under the name Mejoral. The name "Mejoral" approximates the Spanish word for "better" and it was intended to and did create the impression that it was a better product developed by the joint enterprise. This substitute Aspirin preparation was substantially identical to the products sold by the joint enterprise and Sterling so informed the customers who had purchased products from the joint enterprise. The substitute product was packaged in a special manner distinctive of the products of the joint enterprise, i.e., two tablets in a glassine envelope. Mejoral was sold at the same price and through the same channels of distribution as the products of the joint enterprise. By this means Sterling appropriated 100% of the business of the joint enterprise.

25. Furthermore, plaintiff is informed and believes that Sterling paid the expenses of the transfer of the good will of the joint enterprise to its own possession by Bayer's funds. Plaintiff is further informed and believes that Sterling applied to this purpose the sums previously stated to be at least $500,000 due to Bayer under the 1920 Latin American Aspirin agreement for the year 1941. Instead of paying these funds to Bayer as it was obligated, Sterling withheld the payment and used it to pay the expenses necessary to advise the Latin American wholesalers and

public that the product they had previously known under the name of Bayer Aspirin or similar related names would now be available under the new name Mejoral. Thus the appropriation by Sterling of the Latin American Aspirin business to itself was not only an appropriation of the entire good will of the joint business but it was actually carried out with the plaintiff's funds.

26. In addition, Sterling set about a program of safeguarding the business it had appropriated. It intended not only to keep from Bayer the business it had appropriated, but also to prevent Bayer from ever returning to compete with that business after the war. For this purpose it caused cancellation of the registration of Bayer Aspirin products by the health authorities in the various countries so the products could no longer be sold in those countries. Further, it obtained control by various means of a number of the trademarks for Aspirin and Aspirin compounds owned by Bayer in several Latin American countries, including the name Bayer and the Bayer Cross. It acquired these trademarks, not for the purpose of using them, but solely for the purpose of freezing Bayer so far as possible out of the Latin American markets in the postwar period when it would again be possible for Bayer to return to those markets. This activity was a further violation of Sterling's fiduciary obligations arising from the 1920 agreement of joint venture.

27. The claims of Bayer resulting from these events relating to the Latin American Aspirin business and the appropriation of the assets and good will of that business were not vested by the United States Alien Property Custodian.

28. By the end of 1946 trade relations were restored between the United States, Germany and Latin America. Resumption of business relations and accounting between the partners under the 1920 contract then became legally

possible. Nevertheless, Sterling did not grant Bayer any participation in the business which it had erected by the use of the funds and the good will of the joint Bayer-Sterling business, nor did it account to Bayer in any way. Instead Sterling denied any obligation to account to Bayer with respect to the Latin American joint venture, and refused even to discuss the matter.

29. By appropriating the funds and good will of the existing Latin American Aspirin business during the period prior to and during the war and by its other activities recited above, Sterling is the trustee of the business it now conducts in Aspirin products and compounds (e.g., Mejoral) in Latin America, and in other products covered by the agreement of 1920. It is accordingly required to account to Bayer with respect to that business for all years from 1947 forward.

30. The exact extent of the relief to which Bayer is entitled because of the joint enterprise and properties appropriated is not known to plaintiff and for that reason discovery is necessary.

WHEREFORE, plaintiff prays (1) for a declaration that the business now conducted by Sterling in Aspirin products (e.g., Mejoral) in Latin America and in other products covered by the 1920 agreement is held by it in proper part as trustee for plaintiff, and (2) for an accounting with respect to said business, and (3) for such other and further relief as may to the Court seem just.

For an Alternative Third Cause of Action

31. Plaintiff repeats the allegations of paragraphs 1-29.

32. By reason of the activities recited above Sterling is guilty of a breach of the 1920 agreement by its actions in 1941 and thereafter.

33. For this breach, in lieu of impressing a trust on Sterling's Latin American business, if for any reason such a trust should not be impressed, plaintiff pleads in the alternative that it has been damaged by the breach of the contract.

34. As a result of this breach by defendant plaintiff lost its interest in a valuable going business which defendant appropriated to itself and its share of the profits of that business.

WHEREFORE, plaintiff prays in the alternative for damages for breach of the Latin American Aspirin agreement of 1920.

For a Fourth Cause of Action

35. Plaintiff repeats the allegations of paragraphs 1-30 hereof.

36. In the years 1937 and 1938 Sterling and Bayer entered into agreements to purchase from independent third parties control of a company engaged in the sale of Aspirin products in Chile and of another company engaged in the sale of Aspirin products in Argentina.

37. Pursuant to this understanding Sterling in those years purchased the business of these companies as agent and trustee for Bayer as to 75%. The Chilean company, Laboratorios Recalcine, was purchased and its assets placed in a new company formed for this purpose and called Laboratorios Hegemann y Cia. Ltda. of Santiago, Chile. In the case of the Argentine company called Laboratorios Suarry S.A. of Buenos Aires, a majority of the shares were purchased and the same company continued.

38. It was agreed between Bayer and Sterling that the purchase of each of these companies was to be 75% for the benefit of Bayer and 25% for the account of Sterling, and that payment was to be made in the same proportion.

The purchase price was in each case advanced in full by Sterling. It was agreed, however, that Bayer's 75% share plus interest thereon at 4% was to be liquidated (a) out of the share of Bayer in the profits of the particular company, and (b) out of Bayer's share in the profits of the particular country (Chile or Argentina) under the Latin American Aspirin agreement of 1920.

39. By this means full payment was made by Bayer for its 75% share in the Chilean company by August of 1940. As to the Argentine enterprise, approximately 40% of the purchase price was paid by the end of the year 1940. On information and belief, Bayer's share of the profits of Laboratorios Suarry for the year 1941 and its share of the Latin American 1920 Aspirin contract for Argentina for 1941 was substantial. However, defendant has made no accounting of the amount of profits for the period in question and for periods thereafter and plaintiff cannot therefore state the extent to which the shares of the Argentine company was paid for in the agreed manner.

40. Although Sterling agreed it would keep in trust for Bayer a 75% interest in these companies, it has to date made no accounting of its trust, and plaintiff is informed and believes that Sterling has appropriated to its own use the properties and businesses in question.

41. Certain other properties and companies in Latin America were jointly owned by Bayer and Sterling and entrusted to Sterling. Sterling has to date made no accounting to Bayer in this respect and Bayer is informed and believes Sterling has appropriated to its own use the properties and businesses in question.

42. Sterling is liable to account to Bayer for these companies and the proceeds of their businesses. Bayer is not specifically informed as to the disposition of these businesses and demands discovery and an accounting therefor.

WHEREFORE, plaintiff demands (1) an accounting from Sterling with respect to the so-called Hegemann and Suarry businesses purchased for joint account in 1937 and 1938, and all other joint businesses and properties in Latin America, and (2) the impressing of such trusts and the payment of such amounts as may restore it to the status to which it is equitably entitled with respect to such business and properties, and (3) for such other further relief as may to the Court seem just.

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September 28, 1955

Excerpts from Answer

* * * * * * * * * *

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

25. Plaintiff and plaintiff's alleged predecessor and assignor, I. G. Farbenindustrie, at all times during their respective corporate existence in and after 1941 were corporations organized under the laws of Germany and were subjects and residents of Germany.

26. A state of war existed between the United States and Germany from and after December 1941.

27. Under the alleged agreements referred to in the complaint between plaintiff's alleged predecessor and assignor and Sterling or its subsidiaries or affiliates, there were executory provisions to be performed by plaintiff's alleged predecessor and assignor which had not been fully performed at the commencement of said state of war. Such executory provisions constituted a material part of the bargain to defendant represented by said agreements.

28. Plaintiff's alleged predecessor and assignor on and after the declaration of said state of war on or about December 11, 1941 was an enemy of the United States within the purview and meaning of the Act of Congress of October 6, 1917, c. 106, 40 Stat. 411, 50 U.S.C. App. §1, as amended, commonly known and herein referred to as the "Trading with the Enemy Act." By reason of said declaration of war, plaintiff's alleged predecessor and assignor became and continued to be an enemy of the United States, and further performance of said agreements by defendant became unlawful, no sums accrued or became payable from defendant to plaintiff under said agreements, said agreements were abrogated, became null and void, and of no further force and effect.

* * * * * * * * * * *

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

31. Repeats each and every allegation, as if set forth at length herein, contained in paragraphs "25" through "28" of this answer.

32. The Joint Resolution of the Congress of the United States adopted on or about October 19, 1951 (c. 519, 65 Stat. 451) relating to the termination of the state of war between the United States and Germany provided:

> "That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended * * * or which has heretofore been vested or seized under that Act * * * including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act * * * in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior thereto, under that Act of Germany or of any person with respect to any such property or interest."

33. The claims alleged in the complaint (if they exist) were property or interests which prior to January 1, 1947, were subject to vesting or seizure under the provisions of the Trading with the Enemy Act, and the status of plaintiff as an enemy alien with respect thereto has not been changed.

34. Plaintiff cannot lawfully institute or maintain in the courts of the United States any action with respect to the claims alleged in the complaint and this Court is without jurisdiction of the subject matter of this action.

* * * * * * * * * *

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March 16, 1956.

Order to Show Cause

UPON the annexed affidavit of John T. Cahill, sworn to the 23d day of March, 1956, and upon all the pleadings and prior proceedings had herein, and good cause appearing therefor,

NOW, on motion of O'Mara, Schumann, Davis & Lynch, attorneys for Sterling Drug, Inc., the above-named defendant, it is,

ORDERED, that plaintiff above-named show cause before him in the United States District Court, Newark, New Jersey, on the 14th day of May, 1956 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered pursuant to

Opinion

Rules 12(c) and 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of defendant and against plaintiff upon the ground that there was no genuine issue of any material fact and that defendant is entitled to a judgment as a matter of law, and it is

FURTHER ORDERED, that further proceedings of this action be and the same hereby are stayed pending the hearing and determination of the motion upon the return of this Order to Show Cause.

Sufficient reason appearing therefor, service of a copy of this Order, together with the papers upon which it is granted, on or before March 31st, 1956, at 4:00 P.M. o'clock in the afternoon shall be deemed good and sufficient service.

Dated: Newark, New Jersey
March 26, 1956

WILLIAM F. SMITH
United States District Judge

Opinion

Filed February 5, 1957

SMITH, District Judge:

The plaintiff in this action, a corporation organized under the laws of Germany, was formerly an enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act of 1917, 50 U.S.C.A., App. 2(a). The complaint is in four counts, each of which states a separate and distinct claim: first, a claim for profits allegedly due under a contract; second, a claim to property held by the defendant; third, and in the alternative, a claim for damages for breach of contract; and fourth, a claim based upon a breach of trust. The respective claims, according to the allegations

of the complaint, are predicated on an alleged breach of contract which occurred in 1941, or shortly thereafter, and prior to January 1, 1947. The exact date of the alleged breach of contract is unimportant. The claims, although not seized, were subject to seizure and vesting under the Act.

The defendant filed an answer in which it is alleged, as an affirmative defense, that the plaintiff has no right to "institute or maintain" the action. The defense rests solely upon an express limitation in House Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A., App. XX. The defense is raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

The Joint Resolution, supra, is determinative of the issue raised by the defendant. The Resolution reads as follows:

> "* * *, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, ANY PROPERTY OR INTEREST WHICH PRIOR TO JANUARY 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE UNDER THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT OF OCTOBER 6, 1917 (40 STAT. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, SHALL CONTINUE TO BE SUBJECT TO THE PROVISIONS OF THAT ACT IN THE SAME MANNER AND TO THE SAME EXTENT AS IF THIS RESOLUTION HAD NOT BEEN ADOPTED and such proclamation had not been issued. Nothing herein and nothing in

such proclamation shall alter the status, as it existed immediately prior thereto, under that Act, of Germany or of any person with respect to any such property or interest." (Emphasis by the Court).

The Joint Resolution by its express terms reserved the right of the United States to seize property which was "subject to vesting or seizure under the provisions of the Trading with the Enemy Act" prior to January 1, 1947.

The force and effect of the Joint Resolution is fully discussed in the excellent opinion by Judge Swaim in the case of *Ladue & Co.* v. *Brownell*, 220 Fed. 2d 468, cert. den., 350 U.S. 823. It is therein stated, at page 471: "* * * the Joint Resolution which officially terminated the war with Germany expressly reserved and extended the power of the United States to seize for its own use all property located in the United States which prior to January 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE under the Trading with the Enemy Act, and which was owned by nationals of Germany. The reservation of this power was an integral part of formally bringing the war to a close. Cessation of hostilities between the United States and Germany had occurred with the unconditional surrender of Germany on May 8, 1945. From that date to October 19, 1951, when the Joint Resolution was approved, only a technical state of war had existed between the United States and Germany. During that period of more than six years the Government had continued to seize property in this country belonging to German nationals." (Emphasis by the Court).

It is further stated at page 471: "In the reservation of the power to seize the property of German nationals Congress may have had in mind that such seizures would tend to serve as a deterrent to a third war with Germany, but it is certain from the Legislative History of the Joint Resolution, * * *, that the proceeds of the property seized were

to be used to remedy the evils which had arisen from the war; that the proceeds of the seized property were to be used to pay the just and legitimate claims against the United States arising from the war in accordance with the War Claims Act of 1948. Seizure of the property of enemy aliens for this purpose was clearly a proper exercise of the war powers."

There can be no doubt that as to property which "was subject to vesting or seizure" prior to January 1, 1947, the right of the United States was preserved and the enemy status of a German corporation was continued, notwithstanding the termination of the state of war. The disqualification incident to the enemy status of a German corporation was likewise continued. It is well established that a nonresident enemy alien, until the disqualification is lifted by a treaty of peace or otherwise, may not invoke the jurisdiction of the Court. *Johnson* v. *Eisentrager*, 339 U.S. 763, 776; *Ex parte Colonna*, 314 U.S. 510, 511; Sec. 7(b) of the Trading with the Enemy Act, 50 U.S.C.A. App. 7(b). This principle applies to a corporation organized under the laws of an enemy state.

We are of the opinion that a German corporation may not prosecute an action to enforce a right of property which is subject to seizure by the Alien Property Custodian under the provisions of the Trading with the Enemy Act, at least until the right of seizure is definitely terminated by law. It follows that the plaintiff may not maintain the instant suit at this time.

The defendant argues that the proviso contained in the Joint Resolution was abrogated by "the events" which followed the approval of the said Resolution. We have carefully examined the documents upon which the plaintiff relies and we are of the opinion that the argument is without merit. We find nothing in these documents inconsistent with the proviso contained in the Joint Resolution. We therefore make only brief reference to these documents.

We must be guided in our interpretation of these documents by a fundamental principle of construction. It is well established that repeals "by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty." *Johnson* v. *Browne*, 205 U.S. 309, 321; see also *United States* v. *Lee Yen Tai*, 185 U.S. 213; *Whitney* v. *Robertson*, 124 U.S. 190. A joint resolution regularly adopted and approved has the force and effect of a statute.

The plaintiff relies firstly, on the "Treaty of Friendship, Commerce and Consular Rights," ratified on July 21, 1953 and concluded on November 5, 1954. This treaty makes applicable, "as a provisional measure pending the conclusion of a more comprehensive" treaty, the "Treaty of Friendship, Commerce and Consular Rights," concluded on December 8, 1923, 44 Stat. 2132.

The pertinent provision of Article I of the latter treaty reads as follows: "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." This provision cannot be construed as a repeal of the Joint Resolution. The language reads in future and is consistent with the right preserved under the Joint Resolution, to wit, the right to seize and vest property subject to seizure and vesting prior to January 1, 1947.

The plaintiff relies secondly on the "Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany," signed on October 29, 1954 and ratified on July 27, 1955. The pertinent provision of Article VI of this treaty reads as follows: "Nationals and companies of either Party shall be accorded national treatment with

respect to access to the courts of justice * * * within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." This provision, like the provision contained in the earlier treaty, cannot be construed as a repeal of the Joint Resolution. The language, as in the earlier treaty, reads in futuro and is consistent with the right preserved under the Joint Resolution.

The plaintiff relies finally on the "Bonn Occupation Agreements" of May 26, 1952 as amended by the "Paris Protocol" of October 23, 1954. There is nothing in these agreements which may be construed as a repeal of the Joint Resolution. It is to be noted that Article 3, paragraph 1, of the "Convention on the Settlement of Matters Arising out of the War and the Occupation" impliedly, if not expressly, recognizes the right reserved under the said Resolution. The pertinent language reads as follows: "The Federal Republic (of Germany) shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of a state of war, * * *."

It does not follow, however, that the defendant is entitled to prevail on the present motion. A judgment under either Rule 12(c) or Rule 56(b) is essentially a judgment on the merits and may be entered only upon a conclusive determination of the issues of law. The only relief to which the defendant is entitled at this time is a dismissal of the action without prejudice; if and when the disqualification incident to the enemy status of the plaintiff is lifted, either by treaty or otherwise, the plaintiff may have a right to maintain its action in a court of competent jurisdiction.

The motion for judgment will be denied. The present action, however, will be dismissed, without prejudice to the right of the plaintiff to institute and maintain a new action when the disqualification is lifted.

Order

This matter having come before the Court on the application of defendant for an order pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of the defendant; and, the Court having considered the record herein and the arguments of counsel and having filed its opinion with the Office of the Clerk on the 5th day of February, 1957:

It Is Ordered, on this 4th day of March, 1957, that the motion for judgment be, and it hereby is, denied but that the present action shall be, and it hereby is, dismissed without prejudice.

William F. Smith
U.S.D.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 886

STERLING DRUG INC.,
Petitioner,

v.

FARBENFABRIKEN BAYER A. G.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No.

STERLING DRUG INC.,
Petitioner,

v.

FARBENFABRIKEN BAYER A. G.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Sterling Drug Inc. (hereinafter "Sterling") prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review a decision of that Court reversing an order of the United States District Court for the District of New Jersey. The District Court had held that respondent Farbenfabriken Bayer A. G. (hereinafter "Farben"), whose status as an enemy alien with respect to the claims alleged in this action had been continued by Congressional Joint Resolution 289, could not sue in an American court to enforce those claims until such time as its status with respect to such claims had been changed.

Opinions Below

The opinion of the Court of Appeals has not yet been reported, and is printed as Appendix A, *infra*. The opinion of the District Court is reported at 148 F. Supp. 733, and is printed as Appendix B, *infra*.

Jurisdiction

The judgment of the Court of Appeals is dated, and was filed on, January 2, 1958.

The jurisdiction of this Court is invoked under 62 Stat. 928 (1948), 28 U.S.C. §1254 (1) (1952).

Question Presented

1. Did Congressional Joint Resolution 289 of October 19, 1951, terminating the state of war with Germany with the express proviso that "Nothing herein and nothing in such proclamation [by the President] shall alter the status • • • of any person with respect to any • • •" property which was subject to vesting prior to January 1, 1947, mean that the status of Farben as an enemy alien with respect to such property was thereby changed from the status of disqualification to sue in our courts to the status of full qualification to sue in our courts?

Statutes Involved

The statute involved is the Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§1-40 (1952), as amended, 50 U.S.C.A. App. §§6(b), 9, 20, 32, 33, 39 (Supp. 1957). Relevant portions of that Act are printed in Appendix C, *infra*.

Also involved is Congressional Joint Resolution 289, October 19, 1951, 65 Stat. 451, 50 U.S.C. App. notes prec. §1 (1957). Its text is as follows:

"That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act of Germany or of any person with respect to any such property or interest."

Statement of the Case

Sterling ("Sterling" will refer herein both to the present petitioner and to its predecessor company, Sterling Products [Incorporated]), is a Delaware corporation engaged in the development, manufacture, distribution and sale of drugs and pharmaceutical products.

Farben is a corporation organized under the laws of the Federal Republic of West Germany, and is also engaged in the pharmaceutical and other businesses (App. 3a*). Farben asserts that it is the postwar successor and as-

* The pages of Farben's Appendix in the Court of Appeals are numbered and cited 1a, 2a, 3a, etc.; the pages of Sterling's Appendix therein are numbered and cited 1b, 2b, 3b, etc.

signee of the giant German trust, I. G. Farbenindustrie A. G., with respect to the claims here sought to be enforced (App. 3a-4a). (Hereinafter "I. G. Farben" will designate both the trust and the predecessor companies which were merged in 1926 in the organization of the trust).

On September 28, 1955, Farben filed two separate actions against Sterling in the United States District Court for the District of New Jersey. Federal jurisdiction was asserted to be based on 62 Stat. 930 (1948), 28 U.S.C. §1332(a)(2) (1952) (App. 3a). Both complaints assert claims based upon certain illegal cartel agreements which were entered into between I. G. Farben and Sterling and its subsidiaries or affiliates in the 1920's.

Briefly, one action was an antitrust action seeking, among other things, to compel Sterling to grant to Farben licenses under certain trade-marks and patents owned by Sterling or its subsidiaries or affiliates since prior to 1941, and allegedly transferred thereto by I. G. Farben during the 1920's and 1930's pursuant to the illegal cartel agreements.

The second action, which is the one before this Court, seeks an accounting and damages for the alleged breach in 1941 of one of the illegal cartel agreements. This complaint was dismissed by the District Court on the ground that the claims alleged therein constituted property subject to vesting or seizure on and prior to January 1, 1947, and that under the terms of Congressional Joint Resolution 289 of October 19, 1951, terminating the state of war with Germany, Farben's status as an enemy alien was expressly reserved as unchanged with respect to such property. The District Court therefore concluded that Farben could not maintain this suit at this time (App. B, p. 7).

This decision was reversed by the United States Court of Appeals for the Third Circuit, which held that the effect of the Joint Resolution, despite the express language of the proviso thereto, was to remove completely Farben's status as an enemy alien in respect of its prior disqualification to sue, even with respect to property subject to vesting and seizure on and prior to January 1, 1947 (App. A, pp. 6-8).

A. Background.

Prior to the outbreak of World War I in 1914, I. G. Farben had created a wholly-owned subsidiary in the United States named The Bayer Company, Inc. (hereinafter "Bayer"), a New York corporation (App. 4a-5a).

In January, 1918, after the United States declared the existence of a state of war with Germany, the capital stock of Bayer was vested by the Alien Property Custodian for the United States Government (App. 5a). In December, 1918, Sterling purchased all the vested capital stock of Bayer from the Alien Property Custodian; thereafter, Bayer operated as a subsidiary of Sterling, continuing both its domestic and export pharmaceutical business (App. 5a). Bayer has since been merged into Sterling (App. 8b).

When Sterling purchased the Bayer stock in 1918, Bayer was the owner in the United States of many duly registered trade-marks and trade-names, including "Bayer" and the Bayer Cross (which consists of the vertical and horizontal spelling of the name "Bayer", in cross fashion, against a circular background) (App. 4a-5a). Sterling still owns and uses these trade-marks and trade names. In addition, Bayer owned trade-marks and trade names in various countries in Latin America, where it had also done business (App. 5b).

B. The 1929 Latin American Aspirin Cartel Agreement.

In 1929, I. G. Farben and Bayer entered into the agreement which is Exhibit "A" to the complaint in the present action (App. 23b). This contract related to the aspirin business in Latin America and eliminated competition in that area between the two companies in sales of aspirin and certain other pharmaceutical products. Under the terms of the agreement, I. G. Farben received all of the Latin American trade-marks and trade names relating to aspirin and these other products. It in return licensed the use of those trade-marks and trade names to Bayer, which was permitted to conduct the joint aspirin business, provided it did so through I. G. Farben agents wherever possible. I. G. Farben was to receive 75% of the profits and Bayer was to receive 25%.

The parties operated under this contract from 1929 to 1941, when Bayer completely and finally ceased its performance because of (1) the direction of the United States Government, pursuant to its program of economic warfare against Germany, that Bayer cease such performance; and (2) the entry of a consent decree declaring the contract illegal and void under the federal antitrust laws and enjoining Bayer's further performance thereof, *United States* v. *Alba Pharmaceutical Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,150 (S.D. N.Y. 1941).

C. The Additional 1923 Cartel Agreements Dividing the World Pharmaceutical Market.

In 1923, I. G. Farben and Sterling, and certain of the latter's affiliates or subsidiaries at that time, entered into several additional agreements, which in 1926 were modified in certain respects and reaffirmed when I. G. Farben itself was formed from the merger of its predecessor companies

and became a party to the contracts (App. 9b). These contracts have been described as "the usual form of international cartel arrangement," *United States* v. *Bayer Co.*, 135 F. Supp. 65, 69 (S.D. N.Y. 1955).

The agreements provided for a division of world sales territories in pharmaceutical and related products (App. 9b-10b). Sterling and its affiliates or subsidiaries were required to limit their sales of these products (except aspirin in Latin America) to markets in the United States, Canada and Cuba. I. G. Farben was freed from Sterling's competition in the rest of the world, and in addition was given one-half of Sterling's profits from its Cuban sales. Further, I. G. Farben received one-half of the profits (and subsequently one-half of the stock) of Sterling's American subsidiary in the ethical drug business, Winthrop Chemical Co., Inc., and Sterling's English subsidiary, Bayer Products, Ltd. I. G. Farben in return agreed to assign to Sterling or its affiliates or subsidiaries any rights within their respective territories to patents, trademarks and trade names on any new developments in the field of pharmaceuticals and related products (App. 9b).

The parties operated under these agreements also until 1941, when Sterling and its affiliates and subsidiaries completely and finally ceased their performance, again because of (1) the direction of the United States Government, pursuant to its program of economic warfare against Germany, that performance be halted; and (2) the entry of a second consent decree declaring the contracts illegal and void under the federal antitrust laws and enjoining Sterling's further performance thereof, *United States* v. *Bayer Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,151 (S.D. N.Y. 1941).

For nearly two decades the parties performed under these agreements, and benefits flowed both ways (App. 10b).

I. G. Farben received substantial sums of money and, eventually, one-half of the stock of two of the principal Sterling subsidiaries, Winthrop Chemical Co., Inc. and Bayer Products, Ltd. In addition, I. G. Farben was free from competition by Sterling and its affiliates or subsidiaries in most of the markets of the world. Sterling in turn benefited through the receipt by Winthrop Chemical Co., Inc. of certain of I. G. Farben's new developments for exploitation in its sales territories, including the United States (App. 10b).

D. The 1941 Department of Justice Investigations Preliminary to the Consent Decrees.

During a five-month period of 1941, under a grand jury subpoena addressed to Sterling and dated April 10, 1941, the Antitrust Division of the Department of Justice conducted an investigation of the cartel agreements referred to above. This investigation was conducted in the United States District Court for the Southern District of New York, and was under the direction of Thurman Arnold, at that time head of the Antitrust Division, and who is counsel for Farben in the present action (App. 10b).

As a result of the investigation, Mr. Arnold informed Sterling that each of the contracts was illegal under the antitrust laws and that Sterling had to terminate its performance thereof. Negotiations were promptly entered into with Mr. Arnold. After rejecting early proposals, Mr. Arnold finally cleared two proposed decrees which were entered on September 5, 1941 in two civil actions brought by the Department of Justice in the United States District Court for the Southern District of New York. Mr. Arnold consented to both decrees on behalf of the United States (App. 10b-11b).

Two decrees were entered: one in *United States* v. *Alba Pharmaceutical Co.* and the other in *United States* v. *Bayer Co.* (Civil Actions Nos. 15-363 and 15-364), CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶¶56,150-1 (S.D. N.Y. 1941). Sterling was a defendant in each action; the other parties were Alba, Bayer and Winthrop, all affiliates or subsidiaries of Sterling. I. G. Farben was not a party to either decree (App. 11b).

The *Alba* decree declared unlawful the Latin American aspirin contract of 1920, upon which the suit at bar is based, and enjoined Bayer from further performance thereof. Bayer was also compelled to terminate, no later than December 31, 1941, all arrangements with I. G. Farben under that agreement, and to surrender all licenses for the use of I. G. Farben's trade-marks in Latin America. All payments by Bayer to I. G. Farben were also prohibited (App. 11b).

The *Bayer* decree declared unlawful the 1923 division-of-territory agreements, and enjoined Bayer and Sterling from the performance thereof (App. 11b).

Both decrees provided that the right, title and interest of Sterling or its affiliates or subsidiaries in any patents, trade-marks and trade names ("such as the name 'Bayer', the 'Bayer Cross' mark and registration thereof") were neither affected nor diminished (App. 12b).

On the same day that the decrees were entered, the Department of Justice issued a press release which stated:

> "Under terms of the consent decrees, signed by Judge Mandelbaum, *all agreements between Sterling and its subsidiaries, on one hand, and between I. G. Farben and its predecessors, on the other, are declared illegal and terminated.** The decrees fur-

* Emphasis ours throughout.

ther provide that Sterling and its subsidiaries shall not by agreement with any other manufacturer of drugs, including I. G. Farben, refrain from entering into any foreign market.

"This will make the products of the American companies available to the Latin American republics whose source of supply has been cut off because of war conditions.

"It is anticipated by the Department that as a result of the decrees there will be increased participation by these American firms in the Latin American market for pharmaceutical products." (Department of Justice, Press Release, September 5, 1941)

Shortly thereafter, on September 25, 1941, Mr. Arnold issued his own release, which stated in part:

"The settlement of this case was eminently satisfactory to me personally and to all the members of my staff who worked on it.

• • • •

"In this case a consent decree was necessary to invalidate *for all future time the illegal contracts on which the criminal information was founded, to prevent the German Dye Trust* [plaintiff's claimed predecessor] *from relitigating the same questions in civil suits between private parties, and to prevent the reestablishment of any future relationship of the same kind between Sterling and the German Dye Trust.*

• • • •

"The decree in this case, however, has many positive advantages in the present emergency. German control of drug outlets in South America has been one of the most effective instruments of propaganda and German influence in this hemisphere. There is an imperative necessity that American concerns build up their own outlets. In spite of the fact that in 1926, in the era of non-enforcement of the antitrust laws, Sterling Products was attempt-

> ing to eliminate competition along with hundreds of other American companies, it still remains an efficient organization for the distribution of drugs. That organization in the present emergency must not be destroyed, nor its efficiency hampered; instead of that, it must receive every assistance in the long and expensive process of establishing American outlets for drugs in this hemisphere." (Department of Justice, Press Release, September 25, 1941)

Immediately after entry of the consent decrees, Sterling undertook all steps required of it to comply therewith, and at no time since has Sterling, its affiliates or subsidiaries performed any of the unlawful agreements or any provisions thereof (App. 13b). Farben admits that its alleged predecessor received notice of the consent decrees within three months of their entry (App. 12a). It was thus on notice before the end of 1941, and prior to the entry of the United States into World War II, that Sterling had repudiated the cartel agreements at the direction of the United States Government, and would never again perform them or any of their provisions (App. 13b-14b).

E. The Nature of the Claims Asserted by Farben.

The claims which Farben now urges against Sterling are necessarily derived from Sterling's repudiation of the cartel agreements in 1941. If Sterling is liable for its failure to perform those agreements, its liability, just as its failure, was complete in 1941; if Sterling is liable to account to Farben under the cartel agreements, such liability was likewise complete in 1941. Such claims are clearly "property" within the meaning of §7(c) of the Trading With the Enemy Act, and could have been vested at any time after the United States entered the war. This has been conceded by Farben in its briefs in the court below.

The District Court ruled that Farben's status as an enemy alien with respect to these claims was preserved by

the express language of Congressional Joint Resolution 289. It held further that this status bars Farben from seeking to enforce these claims in an American court until such time as that status is duly changed (App. B, p. 7).

This decision was reversed by the Court of Appeals for the Third Circuit, which held that the Joint Resolution, despite its specific language, did not preserve such enemy alien status (App. A, pp. 6-8).

Reasons for Granting the Writ

A. The Importance of the Question Presented.

The decision below presents a serious question in the administration of the Trading With the Enemy Act. It not only affects the right to bring suit with respect to property (like that in the case at bar) which, although subject to vesting, was never vested; it also affects the right to bring suit with respect to all property which was actually vested, since Congressional Joint Resolution 289 treats the two kinds of property in identical fashion.

If the decision below is allowed to stand, it will nullify the effectiveness of the extensive program of vesting and seizure of enemy assets carried on by the United States Alien Property Custodian under the provisions of the Trading With the Enemy Act. Of the assets (or the proceeds thereof) vested in the course of that program during World War II, $225,000,000.00* has been transferred to the War Claims Fund for the payment therefrom of American war claims. However, $262,470,000.00** worth of property still remains in the care of the Attorney General as successor*** to the Custodian and is available

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* S. Rep. No. 1347, 85th Cong., 2nd Sess. 8 (1958).

** (As of December 31, 1956) *Ibid.*, p. 2.

*** Exec. Order No. 9788, October 14, 1946, 3 C.F.R. 575 (1957); *Kaufman* v. *Societe Internationale*, 343 U. S. 156, 157, n. 1 (1952); *Cities Service Co.* v. *McGrath*, 342 U. S. 330, 331, n. 1 (1952).

for the payment of debt claims of non-enemy creditors (§34 of the Trading With the Enemy Act) and for future transfer to the War Claims Fund.

Prior to the decision below, it had been universally considered to be law that no German national who, like Farben, was an "enemy alien", was eligible to bring suit to recover such vested property under §9(a) of the Act.*

The ruling of the Court of Appeals in this case completely undoes this. By this decision, the Court of Appeals for the Third Circuit has opened American courts and indeed invited the filing therein of lawsuits against the Attorney General for the return of every piece of vested property (or the equivalent).** It has accomplished this result by removing the continuing "enemy" status imposed by Congress in Joint Resolution 289, with respect to the properties seized, on such would-be claimants.***

The first question presented below was whether Congressional Joint Resolution 289, terminating World War

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* The question to what extent the law should be changed to permit the return to German nationals of such property is a political question which has received considerable Congressional attention. See, e.g., in the last three Congresses: S. 411, S. 1302, H.R. 2537, H.R. 3356, H.R. 4425, H.R. 5647, 85th Cong. 1st Sess. (1957); S. 854, S. 995, S. 2227, H.R. 2102, H.R. 2135, H.R. 3242, H.R. 5840, H.R. 6730, H.R. 6970, 84th Cong., 1st Sess. (1955); S. 3507, S. 3763, S. 4205, H.R. 10889, 84th Cong., 2d Sess. (1956); S. 146, S. 151, S. 155, H.R. 3174, H.R. 3594, H.R. 4926, H.R. 5064, 83d Cong., 1st Sess. (1953); S. 3423, H.R. 9076, H.R. 9475, 83d Cong., 2d Sess. (1954).

** In the case of German nationals alone, vested assets totaled $541,450,000, as of December 31, 1956, S. Rep. No. 1347, 85th Cong., 2d Sess. 2 (1958).

*** There is no answer to this in the court's hint that Farben might have to obtain a license before enforcing any judgment which might be entered in its favor in this case. Section 9(a) of the Act requires return of property to anyone who (1) is qualified to maintain a suit under that Section, and (2) establishes that he is the owner of the vested property. The effect of the court's decision is that any German national, like Farben, can now satisfy the first requirement; and that requirement is the only obstacle to wholesale return.

II between the United States and Germany, preserved Farben's "enemy" status with respect to the claims here sued upon. That resolution provided that "Nothing herein • • • shall alter the status, as it existed immediately prior thereto, under that [the Trading With the Enemy] Act, of Germany or of any person with respect to" any property subject to vesting prior to January 1, 1947. Farben conceded that the claims upon which it has sued in this case are property which was subject to vesting (although never actually vested) prior to January 1, 1947. It is also undisputed that Farben is a corporation organized under the laws of Germany, and as such, had the "status • • • under the Act" of an "enemy".

Had the answer to the first question been that Farben's status with respect to this property remained unchanged, the court would have then been required to decide whether Farben is still disqualified, by the rule barring enemy aliens from access to American courts, to bring suit at this time on these claims. The court below admitted in its opinion that such a disqualification does attach to an enemy alien, and that this rule is recognized by the Trading With the Enemy Act (App. A, pp. 4-5). However, it also held that the Joint Resolution, despite the express language of the proviso contained therein, did not have the effect of continuing a German corporation as an enemy alien with respect to claims situated in this country during World War II and admittedly subject to vesting (App. A., pp. 6-8)

Although the court below was primarily concerned with claims subject to vesting but never in fact vested, the proviso which its opinion construes is equally applicable to property actually seized by the Alien Property Custodian. The first sentence of that proviso explicitly states that "any property or interest which prior to January 1, 1947 was subject to vesting or seizure under the provisions

of the Trading With the Enemy Act * * * *or which has heretofore been vested or seized under that Act* * * * shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted * * *." There has been no subsequent Congressional enactment removing any such property or interest from the provisions of that Act.

§7(c) of the Act provides that one who seeks the return of property taken from him under the vesting program must find his remedy, if any, within the terms of the Act.

The sole procedure available to a claimant such as a German citizen or corporation is set forth in §9(a). It permits "any person not an enemy or ally of enemy," and who claims any right, title or interest in property vested by the Alien Property Custodian, to file a claim with the Custodian (or the Attorney General) for the return of all or part of such property. If the claim is not acted upon within 60 days, such person may institute suit in a federal court "to establish the interest, right, title or debt so claimed, and if so established the Court shall order the payment * * * to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled." The *only* qualification is that the claimant show that he is "not an enemy or ally of enemy."

However, the Court of Appeals below has ruled that a German is no longer an "enemy," even with respect to property or interests which were vested or subject to vesting prior to January 1, 1947. It held that, in passing the Joint Resolution:

> "Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies * * *". (App. A, p. 6)

Thus, it has removed the only obstacle standing in the path of those demanding the return of property legally and properly taken from them, and has invited claims against the United States for the full amount of the property seized. This is a result certainly never contemplated by Congress.

B. The Erroneous Construction of the Joint Resolution.

The court below was able to reach its decision by assuming, at the outset, the very proposition in issue. Thus, in the first sentence of the opinion, Farben is described as a "*former* enemy alien" (App. A., p. 1). The characterization of Farben as a "former enemy alien" of course subsumes the real question presented, *i.e.*, whether such "enemy" status has been preserved to date. As if to add authority, this characterization is repeated frequently, and the fourth paragraph even contains this sentence: "It is *agreed* that Farben *was* an enemy alien" (App. A., p. 4).

Of course, no such characterization was ever agreed to by Sterling. Rather, it has argued consistently both in the District Court and in the Court of Appeals that, with respect to the claims asserted here, Farben has remained an enemy alien; and that as such, it is disqualified to appear as a plaintiff in an American court.

Noting that the proviso of the Joint Resolution preserved unchanged the "status • • • of Germany or of any *person*", Sterling has contended that this continuing enemy status is a *personal* status. However, the Court of Appeals has incorrectly described Sterling's position as being concerned with "the 'status' of the *property* under the Joint Resolution" (App. A., p. 3). This emphasis on "*property*", which displays a complete failure to grasp

Sterling's argument, and which is unwarranted by the clear language of the Joint Resolution, is then used by the court, in the only paragraph of its opinion devoted to the question, to explain away that express language (App. A., pp. 7-8). It limits the term "status" to "a relationship to property, *viz.*, ownership of property or a right to possess property" (App. A., p. 7). Therefore, it is said that neither "the right to bring a suit" nor the right of "access to a court" may be described as a "status", and that Farben is entitled to maintain the present action.

Sterling does not dispute the conclusion that neither of these rights constitutes a "status". It insists that there is but *one* "status" involved in this case, *i.e.*, the continuing enemy "status" imposed on Farben by the Joint Resolution. The disability to maintain the present action, far from being even a separate status, is an *incident* of enemy status that attaches, by operation of law, to an enemy alien.

The opinion below demonstrates the failure of the Court of Appeals to perceive the true purpose of the proviso to the Joint Resolution, and the relationship between the two sentences which comprise it. An examination of the crucial language of the first sentence of the proviso indicates a clear Congressional intent to preserve all rights of the United States Government, under the Trading With the Enemy Act, against any property which had been subject to vesting prior to January 1, 1947, whether or not such vesting had actually occurred. It stated specifically that it dealt with a "property or interest." The claims which Farben seeks here to enforce concededly fall within this category. Such "property or interest" continued to be as subject to the vesting powers as if a state of war continued, *i.e.*, "* * * as if this resolution had not been adopted and such proclamation [by the President] had not been issued."

This was in accordance with the express desire of the President, who had stated that "* * * it is not intended that the termination of the state of war shall in any way change or alter the program * * * under the Trading with the Enemy Act", Letter from Harry S. Truman to Alben W. Barkley, July 9, 1951.

During the continuation of the state of war, non-resident enemy aliens are normally barred from access to United States courts, *Johnson* v. *Eisentrager*, 339 U. S. 763, 776 (1950); *Ex parte Colonna*, 314 U. S. 510, 511 (1942). Immediately upon the declaration by the United States on December 11, 1941, that a state of war existed between the United States and Germany (Joint Resolution 119, 55 Stat. 796, 50 U. S. C. App. notes Prec. §1 [1952]), any German corporation such as Farben's alleged predecessor, I. G. Farben, automatically became an "enemy" within the definition of that term in §2(a) of the Trading With the Enemy Act:

> "Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

Thus, at no time after December 11, 1941 and prior to the termination of the war, was Farben or I. G. Farben qualified to bring this suit or any other suit in any court in the United States.

But for the proviso, German nationals would have ceased to be "enemies," and would have had free access to Ameri-

can courts upon termination of the state of war. Thus, it was necessary to limit the access granted them. Sterling concedes that American courts are open to Farben on any cause of action accruing to it after January 1, 1947. But certain claims, i.e., those relating to property which had been vested or which was subject to vesting prior to January 1, 1947, were excluded from the class of actions upon which suit could be brought.

An express proviso was enacted with respect to:

> "• • • any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act • • •."

As to that property:

> "• • • Nothing herein and nothing in such proclamation [by the President] shall alter the *status*, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

The meaning of this sentence was so clear that it received no elaboration in the Congressional debates. Since the only "status" conferred by the Trading With the Enemy Act is "enemy" status, the phrase "status • • • under that Act" was an unmistakable reference to the definition of "enemy" in §2(a).

This Court has confirmed that Congress intended to bar all those within the category of "enemy" under §2(a) of the Act from access to American courts, *Ex parte Kawato*, 317 U. S. 69 (1942). Plaintiff there was a Japanese resident in this country. Noting that §2(c) of the Act authorized the President to include, by proclamation, within the term "enemy," certain named groups not otherwise included, this Court said:

> "• • • [T]he President [has] not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the courts • • •". (p. 77)

Nowhere in the legislative history of the Joint Resolution is there even a hint that American courts were to be opened to suit on claims which had been located in this country throughout the period of hostilities, and which consequently had been, and still were, subject to vesting and seizure by the Alien Property Custodian. The entire tone of both the President's letter and the Senate Report (S. Rep. No. 892, 82d Cong., 1st Sess. [1951]), is in the future.

In both of these documents, the term "status" is repeatedly used in a context which makes it certain that the President and Congress both thought of a German's status as "enemy." Said the President:

> "• • • [Germany is to be lifted] from its present *enemy status* • • • [Germans in this country] will receive the *status* accorded to nationals of other free governments. They will no longer be classed as *enemies*."

Said the Senate Report:

> "• • • We should remove the disability 'of *enemy status*' which now applies to German nationals • • •".

This interpretation of "status" was confirmed in the Presidential Proclamation issued pursuant to the Joint Resolution, which stated:

> "WHEREAS it has • • • been considered desirable • • • to remove Germany from its present *enemy status* • • •". Proc. No. 2950, October 24, 1951, 3 C.F.R. 51 (1951).

There is no reason to suppose that the term "status", as it finally appeared in the text of the Joint Resolution, had a different meaning.

The Court of Appeals held that the sole purpose of the proviso was to preserve the powers of vesting and seizure of the United States Government. However, this position overlooks the fact that both sentences of the proviso applied to any property or interest subject to seizure or *already seized*. Inclusion of the latter category was not accidental. Congress sought to continue the disqualification to sue with respect to *all* German property situated in this country prior to January 1, 1947.

The decision below renders the last sentence of the proviso totally superfluous and devoid of any meaning. It violates the well-settled rule of construction that a legislative enactment is to be given that construction which imports a harmonious meaning to all of its provisions, rather than that which completely and unnecessarily strips one provision of all significance, *United States* v. *Menasche*, 348 U. S. 528, 538-9 (1955).

The decision below also violates another well-settled rule of construction. An action brought by a wartime enemy seeking the return of vested assets from the Attorney General is a suit against the United States. The opportunity to sue the sovereign is a matter of legislative grace, granted or withheld as Congress in its wisdom shall see fit. Since it is a matter of grace, and not of right, any such grant must be narrowly construed, *McMahon* v. *U. S.*, 342 U. S. 25 (1951).

C. The Conflict with Decisions of Other Courts.

The clarification of restrictions imposed by, and the remedies open under, the Trading With the Enemy Act, is a sufficient ground *per se* for the grant of certiorari, *Guessefeldt* v. *McGrath*, 342 U. S. 308, 310 (1952).

In addition, the decision below, which in effect permits a wartime enemy to bring suit against the United States for the return of property taken from him under the provisions of the Trading With the Enemy Act, is in conflict with the recent decisions of courts in Circuits other than the Third Circuit. See, *e.g.*, the following cases, in each of which suit was filed after the passage of the Joint Resolution, and the plaintiff was denied recovery because of his "enemy" status: *Rusche* v. *Brownell*, 244 F. 2d 782 (D.C. Cir. 1957); *Hansen* v. *Brownell*, 234 F. 2d 60 (D.C. Cir. 1956); *Albert* v. *Brownell*, 219 F. 2d 602 (9th Cir. 1954); *Cordero* v. *Brownell*, 211 F. 2d 90 (2d Cir. 1954); *Kober* v. *Brownell*, 149 F. Supp. 510 (N.D. Cal. 1957); *Central National Bank* v. *Brownell*, 137 F. Supp. 686 (N.D. Ohio 1956).

The opinion is also in conflict with the only litigated decision which has been found in which the proviso of the Joint Resolution was construed with respect to property which, though subject to vesting, was never actually vested. There the same result was reached as by the District Court in the present case. That decision is *Dresler* v. *Greeff*, 282 App. Div. 465, 124 N.Y.S. 2d 412 (1st Dept. 1953).

There, plaintiffs were German nationals who had brought suit in the New York courts in 1938. Prior to trial, war was declared between the United States and Germany, and further prosecution of the action was consequently suspended under the Trading With the Enemy Act. As the record and briefs in that case show, a stipulation was then entered into between the parties providing that the action might be dismissed if the case were not restored to the calendar within "one year after the disability of said plaintiffs under the Trading with the Enemy Act to prosecute said action shall cease." The stipulation also provided that neither party could restore

the case to the calendar within one year after the removal of the disability.

More than one year after the passage of the Joint Resolution, defendants moved to dismiss for lack of prosecution upon the theory that, with the enactment of the Joint Resolution, the disability of the enemy plaintiffs to sue had been removed. The motion was granted at Special Term.

Upon appeal, the order was reversed, the court holding that plaintiffs' right to prosecute was still suspended by the terms of the Joint Resolution. Correspondingly, plaintiffs' cross-motion to restore the case to the calendar was denied.

In holding that the plaintiffs' disability to sue had not been removed by the passage of Joint Resolution 289, the Appellate Division of the New York Supreme Court stated:

> "This action involves property interests which under the provisions of the Trading With the Enemy Act were subject to vesting prior to January 1, 1947. In 1942, when the stipulation in issue was signed, the German aliens were enemy nationals. It would appear from a reading of the resolution that for the purposes of prosecuting this lawsuit their status remains unchanged." 282 App. Div. at 466, 124 N. Y. S. 2d at 413-414.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1, 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,226

FARBENFABRIKEN BAYER A. G.,
Appellant,

v.

STERLING DRUG, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 11, 1957

Before BIGGS, *Chief Judge*, and MARIS and MCLAUGHLIN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 2, 1958)

By BIGGS, *Chief Judge.*

The plaintiff, Farbenfabriken Bayer A. G. (Farben), a corporation organized under the laws of the Federal Republic of West Germany, a former enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act, 50 U.S.C.A., App. §2(a), seeks an accounting and other relief against Sterling Drug, Inc. (Sterling), basing

its claims on alleged breaches of a cartel agreement, occurring in 1941 or soon thereafter. These claims, choses-in-action, constitute "property" within the meaning of the Act, Propper v. Clark, 337 U.S. 472, 480 (1949), and were not seized by the Alien Property Custodian though subject to seizure and vesting under Section 5(b), 50 U.S.C.A. App. §5(b). Sterling contends that Farben has no right to "institute or maintain" its action, in view of the limitation or reservation contained in Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A. App. XX. Sterling moved for judgment on the pleadings under Rule 12(c) and for summary judgment under Rule 56(b), Fed. R. Civ. Proc., 28 U.S.C. The Court below agreed with Sterling that Farben could not maintain its suit but did not concur in Sterling's view that it was entitled to a judgment on the merits under the rules cited and therefore dismissed the action without prejudice to Farben to institute and maintain a new action when the disqualification deemed by the court to have been imposed by Executive Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400 as amended, Executive Order No. 8785, June 14, 1941, 6 Fed. Reg. 2897, pursuant to Section 5(b) of the Act has been removed. See 148 F. Supp. 733 (1957).

The Joint Resolution upon which Sterling relies is as follows: "That the state of war declared between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution [Oct. 19, 1951]: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947 was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been

vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest." Following the enactment of the Joint Resolution President Truman on October 24, 1951 proclaimed a termination of the state of war with Germany. Proc. 2950, 16 F. R. (Oct.), p. 10,915.

Farben has advanced several theories under any one of which it asserts that it is entitled to maintain the present action. We will discuss its principal contention only for we deem it to be dispositive of the appeal. Put briefly Farben's principal argument is that the Joint Resolution and the Presidential Proclamation gives it *locus standi* in the court below and entitles it to maintain the suit even if it be the fact that its property under the Joint Resolution still remained subject to vesting and seizure. Sterling asserts that the "status" of the property under the Joint Resolution remains the same as when Farben was an enemy alien and since as an enemy alien it was unable to maintain a suit in our courts, it cannot do so now. We cannot agree.

Our primer in resolving the controversy is, of course, the Trading with the Enemy Act, as amended. We need not discuss the provisions of the Act at length for its purposes and its application are too well known. It is sufficient to state here that it authorized the President to sequester or seize property of enemy governments or enemy aliens, *inter alia*, as defined by Section 2, to the end that the United States might successfully prosecute all objects of war. United States v. Chemical Foundation, 272

U.S. 1 (1926); Koehler v. Clark, 170 F. 2d 779 (9 Cir. 1948). See Dulles, The Vesting Powers of the Alien Property Custodian. 28 Cornell L.Q. 245 (1943). See also the First War Powers Act, 55 Stat. 839 (1941), 50 U.S.C.A. App. Title III, amending Section 5(b) of the Trading with the Enemy Act. It is agreed that Farben was an enemy alien. It is also agreed that the property, the choses-in-action, which are the subject of this suit were never seized.

Nothing in the Act prohibits an enemy alien from maintaining a suit in our courts. In respect to the bringing of suits Section 7(b) of the Act provides in pertinent part: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war. . . ." In short Congress in respect to an enemy maintaining a suit within the United States was content to rely on decisional or common law. The early rule of law, sometimes referred to very generally as "the common law rule," that the King's subjects had a duty to plunder the King's enemies, subsequently modified to a prohibition, personal to an enemy that *qua* enemy he could not maintain a suit, discussed in Petition of Bernheimer, 130 F. 2d 396 (3 Cir. 1942), has been so altered that the Supreme Court has stated that "the sole objection to giving judgment for an alien goes only so far as it would give aid or comfort to the other side." Ex Parte Kawato, 317 U.S. 69 (1942), quoting in part from Berge-Forbes Co. v. Heye, 251 U.S. 323.

We are somewhat troubled by the statement in Kawato that "Section 7 bars from the courts only an 'enemy or ally of an enemy'", 317 U.S. at p. 75, but we are of the opinion that a failure to authorize a suit is a bar to suit when the strict common law rule that an enemy cannot maintain a suit in our courts is in effect, and that this is what the Supreme Court had in mind. Cf. Ex Parte

Colonna, 314 U.S. 510 (1942), wherein it was stated *per curiam* by the Supreme Court refusing leave to file a petition for writs of mandamus and prohibition to be issued to this court: "This provision [Section 7(b)] was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts."[1] It follows that we must hold that though the property, choses-in-action, was available to Farben prior to the declaration of war between the United States and Germany on December 11, 1941, 55 Stat. 796, upon the declaration of a state of war by Congress on that date, the right of Farben to institute suit was then suspended. The disability caused by the suspension was a personal one as we have stated. It was not a substantive failure of the causes of action. They continued to exist but could not be sued upon in a court in the United States.

On December 31, 1946, the President proclaimed the cessation of hostilities of World War II. See Proclamation 2950, *supra*. Then came the enactment of the Joint Resolution of October 19, 1951 with which we are concerned and Proclamation 2950 by the President followed it by four days. Whether or not Farben could have maintained its suit during the period from December 31, 1946 to October 19 or 21, 1951, is a question with which we need not concern ourselves for the suit at bar was commenced on September 28, 1955.

We are of the opinion that Farben is entitled to maintain its suit. The purpose of the Joint Resolution and its proviso is made very clear by its legislative history. The Joint Resolution was enacted at the request of the President. The Senate Report, Sen. Rept. 892, 82nd Cong., 1st

[1] Even if this authoritative decision as to suspension did not exist the legislative history of the Act and the prior decisions of the Supreme Court given in the final paragraph of the opinion, 314 U.S. at p. 511, and which need not be repeated here, would leave no doubt as to the correctness of our conclusion.

Sess., Para. 8 (1951), refers to the Presidential message, quoting from it the reason for the President's request. This was that it was necessary to retain control of German property already vested and possibly to vest other German property, even though the war had terminated.

Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies but deemed it necessary to make certain that the President should retain the right to vest certain German property. The proviso of the Joint Resolution was designed to effect this end; a result which was deemed to be in doubt "unless expressly provided for in new legislation."[8] The terms of the proviso were held to effect the

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[8] [sic] The President wrote as to why the vesting power should not lapse, as follows: "Most of this German property has already been identified and vested. This Government does not intend to embark on any new program in this field. However, some of the property already subject to vesting is believed to be cloaked or hidden and not yet discovered, and some is still under examination or subject to legal proceedings. Most of the property remaining unvested is involved in problems of conflicting jurisdiction between this and other governments, which are in the process of settlement by negotiation under authority of legislation which was enacted in September of last year.

"Should the vesting power lapse immediately, this Government would find it difficult to wind up this program in an orderly way, or to carry out its commitments for the equitable settlement of intergovernmental differences relating to enemy property."

[8] The purpose of the proviso of the Joint Resolution was stated as follows: "In the absence of treaty provisions, however, there may be legal obstacles to the continued vesting of German property, after the termination of the state of war, unless there are changes in our existing statutes. According to the terms of the Trading With the Enemy Act, many of its powers expire at the 'end of the war,' a phrase which the act defines to mean the date of proclaiming the exchange of ratifications of a treaty of peace, or an earlier date fixed by Presidential proclamation. There is some doubt that the vesting powers of the Trading With the Enemy Act can be exercised after the termination of the state of war, unless expresly provided for in new legislation.

"This doubt should be eliminated, and it should be made clear that the Congress intends the vesting of German property for the purpose of paying war claims to continue." See Sen. Rept. 692, 82nd Cong., 1st Sess., Para. 8.

result intended. Ladue & Co. v. Brownell, 220 F. 2d 468 (7 Cir. 1955). In brief it was the intention of Congress to effect peace between the Federal Republic of West Germany and German nationals and the United States and to restore the normal rights and relations ordinarily in effect betwen friendly peoples but to retain and obtain control of Germanic property in the United States under Section 5(b) of the Act where necessary.[4] We have no doubt the legal effect of the Joint Resolution and the Proclamation engrafted on the Trading with the Enemy Act was to wipe out the suspension of the right of a German national to bring suit in the United States.

The error of the court below lies, we believe, in its approach to the term "status" as employed in the Joint Resolution. While the court properly held that property of a former German enemy alien was subject to vesting and seizure at the will of the Executive, the primary concern of both the President and the Congress was with the power of the Executive to vest property and not with access to courts in the United States. The term "status" is properly used in respect to a relationship to property, viz., ownership of property or a right to possess property. The proviso deals with ownership in or a right to property. The right to bring a suit, to access to a court may not be

[4] By 1951, as we have indicated, the German people in the Western Zones of Germany had created the Federal Republic of West Germany resting upon a democratic constitution which had been approved by the western occupation powers. That Republic became a member of many international organizations and prepared to take an active part in assuring world peace. The United States was trading with Germany, and property which was brought into this country after 1947 was not subject to vesting. General License 94, 31 C.F.R. §131-94 (1947 Supp.), 12 F.R. 2051 (1954). Under such circumstances Congress considered it paradoxical and inconsistent that Germany should retain "enemy status." As a result, the Joint Resolution was enacted so that the "technical and legal relationships between the United States and the Federal Republic of Germany should be made to conform with reality." Sen. Rept. No. 892, Oct. 8, 1951, Part 4.

described properly as a status. It is a general right of a procedural, not of a substantive, character. One does not say that a plaintiff possesses the status to bring a suit. He either has a right to maintain a suit or he does not but his right of access to a court is a personal qualification and is not a *status*.

We conclude therefore that Farben is entitled to maintain its suit and, if the nature of its causes of action and the evidence permit, to secure judgment in the court below. Beyond this the way is pointed out by Zittman v. McGrath, 341 U.S. 446, 449-552 (1951), which held that attachment levies against American holders of claims against German banks were not nullities though, of course, transfer of the funds could not be effected without a license. See Propper v. Clark, 337 U.S. 472 (1949), Orvis v. Brownell, 345 U.S. 183 (1952), Mr. Justice Douglas's dissenting opinion *id.* at p. 191, and Polish Relief v. Banca Nationale Rumaniei, 288 N.Y. 332, 43 N.E. 2d 345 (1942). In Zittman the claims had been vested in the Alien Property Custodian, while Farben's claims have not been seized. Public Circular No. 31, 8 C.F.R. §511.331(d), throws light upon the problem confronting us. This explains the purpose of General Ruling No. 12, 8 C.F.R., §511.212, promulgated pursuant to Section 5(b) of the Trading with the Enemy Act. In pertinent part Section 511.212(d) states that the Treasury does not desire to interfere with litigation concerning enemy aliens "so long as it is clearly understood that judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property." In so holding we assume *arguendo* that Farben's claims are still blocked or frozen by Executive Order 8389 as amended by Executive Order 8785 and General Rule No. 12. We need go no further to dispose of the appeal at bar for Farben may not secure a judgment against Sterling. If Farben should

secure a judgment against Sterling and then seek execution on the judgment, it will be necessary for the court below to determine whether General License No. 101, Section 511.101, 8 C.F.R. (Cum. Supp.) has freed Farben's claims then reduced to judgment.

The judgment of the court below will be reversed with the direction to proceed with the case in accordance with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

District of New Jersey

FARBENFABRIKEN BAYER, A. G., a corporation,
Plaintiff,

vs.

STERLING DRUG, INC., a corporation,
Defendant.

OPINION

C-209-55

Filed—Feb. 5, 1957.

William F. Smith,
Judge, United States District Court.

Smith, District Judge:

The plaintiff in this action, a corporation organized under the laws of Germany, was formerly an enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act of 1917, 50 U.S.C.A., App. 2(a). The complaint is in four counts, each of which states a separate and distinct claim: first, a claim for profits allegedly due under a contract; second, a claim to property held by the defendant; third, and in the alternative, a claim for damages for breach of contract; and fourth, a claim based

upon a breach of trust. The respective claims, according to the allegations of the complaint, are predicated on an alleged breach of contract which occurred in 1941, or shortly thereafter, and prior to January 1, 1947. The exact date of the alleged breach of contract is unimportant. The claims, although not seized, were subject to seizure and vesting under the Act.

The defendant filed an answer in which it is alleged, as an affirmative defense, that the plaintiff has no right to "institute or maintain" the action. The defense rests solely upon an express limitation in House Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A., App. XX. The defense is raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A, and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

The Joint Resolution, supra, is determinative of the issue raised by the defendant. The Resolution reads as follows:

> "* * *, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, ANY PROPERTY OR INTEREST WHICH PRIOR TO JANUARY 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE UNDER THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT OF OCTOBER 6, 1917 (40 STAT. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, SHALL CONTINUE TO BE SUBJECT TO THE PROVISIONS OF THAT ACT IN THE SAME

MANNER AND TO THE SAME EXTENT AS IF THIS RESOLUTION HAD NOT BEEN ADOPTED and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior thereto, under that Act, of Germany or of any person with respect to any such property or interest." (Emphasis by the Court).

The Joint Resolution by its express terms reserved the right of the United States to seize property which was "subject to vesting or seizure under the provisions of the Trading with the Enemy Act" prior to January 1, 1947.

The force and effect of the Joint Resolution is fully discussed in the excellent opinion by Judge Swaim in the case of *Ladue & Co. v. Brownell*, 220 Fed. 2d 468, cert. den., 350 U. S. 823. It is therein stated, at page 471: "* * * the Joint Resolution which officially terminated the war with Germany expressly reserved and extended the power of the United States to seize for its own use all property located in the United States which prior to January 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE under the Trading with the Enemy Act, and which was owned by nationals of Germany. The reservation of this power was an integral part of formally bringing the war to a close. Cessation of hostilities between the United States and Germany had occurred with the unconditional surrender of Germany on May 8, 1945. From that date to October 19, 1951, when the Joint Resolution was approved, only a technical state of war had existed between the United States and Germany. During that period of more than six years the Government had continued to seize property in this country belonging to German nationals." (Emphasis by the Court).

It is further stated at page 471: "In the reservation of the power to seize the property of German nationals Congress may have had in mind that such seizures would tend

to serve as a deterrent to a third war with Germany, but it is certain from the Legislative History of the Joint Resolution, * * *, that the proceeds of the property seized were to be used to remedy the evils which had arisen from the war; that the proceeds of the seized property were to be used to pay the just and legitimate claims against the United States arising from the war in accordance with the War Claims Act of 1948. Seizure of the property of enemy aliens for this purpose was clearly a proper exercise of the war powers."

There can be no doubt that as to property which "was subject to vesting or seizure" prior to January 1, 1947, the right of the United States was preserved and the enemy status of a German corporation was continued, notwithstanding the termination of the state of war. The disqualification incident to the enemy status of a German corporation was likewise continued. It is well established that a nonresident enemy alien, until the disqualification is lifted by a treaty of peace or otherwise, may not invoke the jurisdiction of the Court. *Johnson v. Eisentrager*, 339 U.S. 763, 776; *Ex Parte Colonna*, 314 U.S. 510, 511; *Sec. 7(b) of the Trading With the Enemy Act*, 50 U.S.C.A., App. 7(b). This principle applies to a corporation organized under the laws of an enemy state.

We are of the opinion that a German corporation may not prosecute an action to enforce a right of property which is subject to seizure by the Alien Property Custodian under the provisions of the Trading With the Enemy Act, at least until the right of seizure is definitely terminated by law. It follows that the plaintiff may not maintain the instant suit at this time.

The plaintiff argues that the proviso contained in the Joint Resolution was abrogated by "the events" which followed the approval of the said Resolution. We have carefully examined the documents upon which the plaintiff

relies and we are of the opinion that the argument is without merit. We find nothing in these documents inconsistent with the proviso contained in the Joint Resolution. We therefore make only brief reference to these documents.

We must be guided in our interpretation of these documents by a fundamental principle of construction. It is well established that repeals "by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty." *Johnson* v. *Browne*, 205 U. S. 309, 321; see also *United States* v. *Lee Yen Tai*, 185 U. S. 213; *Whitney* v. *Robertson*, 124 U. S. 190. A joint resolution regularly adopted and approved has the force and effect of a statute.

The plaintiff relies firstly, on the "Treaty of Friendship, Commerce and Consular Rights" ratified on July 21, 1953 and concluded on November 5, 1954. This treaty makes applicable, "as a provisional measure pending the conclusion of a more comprehensive" treaty, the "Treaty of Friendship, Commerce and Consular Rights," concluded on December 8, 1923, 44 Stat. 2132.

The pertinent provision of Article I of the latter treaty reads as follows: "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." This provision cannot be construed as a repeal of the Joint Resolution. The language reads in future and is consistent with the right preserved under the Joint Resolution, to wit, the right to seize and vest property subject to seizure and vesting prior to January 1, 1947.

The plaintiff relies secondly on the "Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany," signed on October 29, 1954 and ratified on July 27, 1955. The pertinent provision of Article VI of this treaty reads as follows: "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice * * * within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." This provision, like the provision contained in the earlier treaty, cannot be construed as a repeal of the Joint Resolution. The language, as in the earlier treaty, reads in future and is consistent with the right preserved under the Joint Resolution.

The plaintiff relies finally on the "Bonn Occupation Agreements" of May 26, 1952 as amended by the "Paris Protocol" of October 23, 1954. There is nothing in these agreements which may be construed as a repeal of the Joint Resolution. It is to be noted that Article 3, paragraph 1, of the "Convention on the Settlement of Matters Arising out of the War and the Occupation" impliedly, if not expressly, recognizes the right reserved under the said Resolution. The pertinent language reads as follows: "The Federal Republic (of Germany) shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of a state of war, * * *."

It does not follow, however, that the defendant is entitled to prevail on the present motion. A judgment under either Rule 12(c) or Rule 56(b) is essentially a judgment on the merits and may be entered only upon a conclusive determination of the issues of law. The only relief to which the defendant is entitled at this time is a dismissal of the action without prejudice; if and when the disqualifi-

cation incident to the enemy status of the plaintiff is lifted, either by treaty or otherwise, the plaintiff may have a right to maintain its action in a court of competent jurisdiction.

The motion for judgment will be denied. The present action, however, will be dismissed, without prejudice to the right of the plaintiff to institute and maintain a new action when the disqualification is lifted.

APPENDIX C

TRADING WITH THE ENEMY ACT OF 1917

Act of Oct. 6, 1917, Ch. 106, 40 Stat. 411
50 U. S. C. App. §§1-40 (1952)

"§2. Definitions

"The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [sections 1-6 and 7-39 of this Appendix]—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.'

* * * * *

"§7. Lists of enemy or ally of enemy officers, directors or stockholders of corporations in United States;

acts constituting trade with enemy prior to passage of Act; conveyance of property to custodian; voluntary payment to custodian by holder; acts under order, rule, or regulation.

• • • • •

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6 and 7-39 of this Appendix].

• • • • •

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [said sections], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

• • • • •

"§9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation,

where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 886

STERLING DRUG INC.,
Petitioner,

v.

FARBENFABRIKEN BAYER A. G.,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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May 12, 1958.

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STERLING DRUG INC.,
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FARBENFABRIKEN BAYER A.G.,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The issue presented by this case is the right of Farben to enlist the aid of American courts in enforcing claims* which were admittedly subject to vesting during World War II by the United States Alien Property Custodian, though never actually vested. It is Sterling's position that Farben, a German corporation, is still an enemy alien with respect to these claims, and therefore has no right of access to courts in this country to bring suit upon them.

To sustain its position, Sterling relies on the terms of Congressional Joint Resolution 289, October 19, 1951, 65 Stat. 451, 50 U.S.C. App. notes prec. § 1 (1957). After declaring the termination of the war with Germany, the Joint Resolution expressly preserved, by way of proviso,

* These claims are founded on a contract which even Farben has conceded in earlier proceedings is illegal under the anti-trust laws.

the wartime *status quo* of enemy nationals and others with respect to German property which was either vested or was subject to vesting prior to January 1, 1947, by stating:

> "Nothing herein and nothing in such proclamation [by the President] shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

Erroneous Construction of Joint Resolution 289

Farben, in its brief, appears to concede by silence that the result reached by the court below is patently inconsistent with the plain meaning of the Joint Resolution. There is only one sentence in Farben's brief which attempts to justify, on the ground that the Joint Resolution was correctly construed, the result reached by the court below. This one-sentence argument is that "the joint resolution [sic] was not intended to permit a wrongdoer to appropriate and confiscate unvested property of Germans after the vesting program had ended" (Br. pp. 11-12).

The short answer to this argument is that of course the Joint Resolution was not so intended, nor has petitioner ever argued that the Joint Resolution should be so construed. Any wrongful appropriation after the vesting program had ended would give rise to a cause of action, and the cause of action would not be "any property or interest which prior to January 1, 1947, was subject to vesting or seizure". Such a cause of action would plainly, therefore, *not* be within the terms of the Joint Resolution and any German whose property had been so appropriated would be free to sue, *Farbenfabriken Bayer A. G. v. Sterling Drug Inc.*, 148 F. Supp. 738 (D.N.J. 1957).

Effort to Minimize Public Importance of Error Committed Below

The main thrust of Farben's brief is that the decision below construing the Joint Resolution has no public importance because it has no effect upon those assets which were actually vested prior to January 1, 1947—instead, argues Farben, the only impact of that decision is upon those assets which, although subject to vesting on that date, were not actually vested (Br. pp. 8-10).

This argument defies the language of the Joint Resolution. That language makes no distinction whatsoever between these two types of property. Both types of property are treated alike:

> "PROVIDED, HOWEVER, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, *any property or interest which prior to January 1, 1947, was subject to vesting or seizure* under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, *or which has heretofore been vested or seized under that Act*, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued."*

Farben purports to find support for its contention that the decision below will have no effect upon vested property in the argument that the doctrine of governmental immunity will prevent suits in respect of property which was actually vested, even if the decision below is allowed to stand.

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* Emphasis supplied throughout.

This argument misconceives what Congress did in the Trading With the Enemy Act.* Under Section 9(a) of that statute, the United States has waived its sovereign immunity from suits to establish title to vested property—subject only to one exception. That one exception is that a disqualification to bring such suits attaches to one who is an "enemy" or "ally of enemy" with respect to the property to which he seeks to establish title.

The effect of the decision by the court below is that despite the language of the proviso to the Joint Resolution, one who would otherwise be an enemy "with respect to any property or interest" vested or subject to vesting on January 1, 1947 no longer has that status in the sense of disqualification to sue. Thus, the decision below removes the only barrier to suits under Section 9(a) by German nationals.**

The decision in *Swiss National Insurance Co. v. Miller*, 267 U. S. 42 (1925), far from supporting Farben's argument that the decision below has no public importance, instead really represents another decision with which the result reached by the court below is squarely in conflict.

Farben further argues that the decision below could have no effect upon the assets of enemy aliens which were actually vested because of a "specific statutory ban

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*40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1952), as subsequently amended, 50 U.S.C.A. App. §§ 6(b), 9, 20, 32, 33, 39 (Supp. 1957).

**By letter dated May 5, 1958, the Chief, Litigation Section, Office of Alien Property, Department of Justice, requested a copy of the Petition for Certiorari herein. A copy was transmitted by petitioner's counsel pursuant to this request by letter dated May 7, 1958. It is respectfully submitted that if this Court should not be disposed to grant the Petition on the basis of the papers filed by the petitioner alone, the Court should not decide this matter until a reasonable opportunity has been afforded the Department of Justice to decide whether to file an *amicus* brief in support of the Petition for Certiorari because of the implications and effect of the decision below upon the administration of vested enemy property.

against return of vested property to German nationals" (Br. pp. 9-10). This prohibition is found only in Section 39 of the Act. However, Section 39 has been expressly held by this Court to be inapplicable to a Section 9(a) suit, *Guessefeldt* v. *McGrath*, 342 U. S. 308 (1952); *Kaku Nagano* v. *McGrath*, 187 F.2d 759 (7th Cir. 1951) *aff'd*, 342 U. S. 802 (1952). Accordingly it would not prevent the recovery by German nationals of vested property if the decision below is allowed to stand.

The Desirability of Review Is Emphasized by Farben

In urging the correctness of the decision below, Farben relies primarily upon the argument that "even if the continued right to vest property on the part of the Government after October 19, 1951 [the adoption of the Joint Resolution] prohibited litigation by German nationals, that right of seizure has long since been terminated" (Br. p. 12). Reference is then made to a series of events occurring after the Joint Resolution and which supposedly support this contention. Although, as will hereafter be shown, the support furnished by these events for this contention is really non-existent, the public importance of the events relied upon is such that an authoritative determination by this Court of their effect is plainly merited.

The first event selected by Farben is a Presidential announcement on April 17, 1953 that there would be no further vesting of German property, 28 Dep't State Bull. 720, 721 (1953). But this announcement was a mere expression of current executive policy and could not, for example, bind future Administrations or even prevent the present Administration from changing this policy if it saw fit to do so.

Farben next cites General License No. 101, June 24, 1953, 8 C.F.R. §511.101 (1958). But the disqualification incident to enemy alien status continued by Con-

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The Desirability of Review Is Emphasized by Farben

In urging the correctness of the decision below, Farben relies primarily upon the argument that "even if the continued right to vest property on the part of the Government after October 19, 1951 [the adoption of the Joint Resolution] prohibited litigation by German nationals, that right of seizure has long since been terminated" (Br. p. 12). Reference is then made to a series of events occurring after the Joint Resolution and which supposedly support this contention. Although, as will hereafter be shown, the support furnished by these events for this contention is really non-existent, the public importance of the events relied upon is such that an authoritative determination by this Court of their effect is plainly merited.

The first event selected by Farben is a Presidential announcement on April 17, 1953 that there would be no further vesting of German property, 28 Dep't State Bull. 720, 721 (1953). But this announcement was a mere expression of current executive policy and could not, for example, bind future Administrations or even prevent the present Administration from changing this policy if it saw fit to do so.

Farben next cites General License No. 101, June 24, 1953, 8 C.F.R. §511.101 (1953). But the disqualification incident to enemy alien status continued by Con-

gress is not subject to repeal or amendment by mere executive license, particularly a license issued under the blocking program. That program had nothing whatever to do with the disqualification to sue in American courts, and was never intended to be concerned with that incident of enemy alien status. Furthermore, the regulations under which General License 101 was issued specifically state:

> "The regulations in this part and any rulings, licenses, or instructions issued hereunder shall not be deemed to authorize any transaction prohibited by reason of any other law, proclamation, order or regulation." (U. S. Just. Dep't. Off. Alien Prop., Regs. §511.4 [1948], 8 C.F.R. §511.04 [1958].)

Finally, Farben cites the treaties of 1954 and 1956 between the United States and Germany, 5 U. S. Treaties & Other Intl. Agreements 1939, T.I.A.S. No. 3062 (effective Oct. 22, 1954); 7 U. S. Treaties & Other Intl. Agreements 1839, T.I.A.S. No. 3698 (effective July 14, 1956). But contrary to Farben's position, these treaties have specifically preserved the vesting power. In an exchange of letters (App. 21b-22b) relating to the 1956 Treaty carried on after its execution, the United States and Germany agreed that the United States had reserved all rights which it had under the Bonn Occupation Agreements. In Chapter 6, Article III, Section 1 of the "Convention on the Settlement of Matters Arising Out of the War and Occupation, as Amended" (one of the Bonn Occupation Agreements of 1952) it is specifically recognized that the vesting of German assets might continue after the signing of that Agreement, and the German Federal Republic agreed to raise no objections thereto:

> "The Federal Republic shall in the future raise no objections against the measures which have been

or will be, carried out with regard to German external assets or other property seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany." Conventions on Relations With the Federal Republic of Germany and a Protocol to the North Atlantic Treaty, S. Exec. Q and R, 82d Cong., 1st Sess. 25, 59-60 (1952).

This provision was left unchanged when the Bonn agreements were extensively amended by the "Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany," Oct. 23, 1954, The Bonn Agreements of 1952 as Amended by the Paris Protocol of 1954, S. Doc. No. 11, 84th Cong., 1st Sess. 102 (1955), signed over a year after the alleged surrender of the vesting power by the United States in the 1954 Treaty, and only six days before the signing of the 1956 Treaty.

In view of the far-reaching consequences of a holding that the 1954 and 1956 treaties repeal by implication an explicit preservation of the vesting power contained in the proviso to Joint Resolution 289, no such implied repeal should be found in this case. Repeals by implication are never favored, *Johnson* v. *Browne*, 205 U. S. 309, 321 (1907); *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221-2 (1902). This rule is of even greater force when the subsequent treaty is general in its scope and the prior law is specific, *Washington* v. *Miller*, 235 U. S. 422 (1914); *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497 (1905).

It must be remembered that the proviso to Joint Resolution 289 was not drafted in a political vacuum. Memories of the bitterness of World War II were more sharply

in force than than now, and the Administration continued to view American assets of German enemies as proper objects of the vesting power. When Congress was asked* to continue the vesting power beyond the termination of a technical state of war, it readily agreed. With respect to those German assets and their preservation pending possible vesting, it was quite appropriate that Congress should accompany that preservation with the exclusion of Germans from our courts insofar as they should be potential parties plaintiff in suits regarding such assets. The language Congress chose to employ to accomplish its goals was so clear that the purpose of that language was unquestioned by any member of Congress.

The result reached by the court below is not a result to be reached by judicial "construction" of inapposite language in an existing statute. It is a result which, assuming it is a proper result, must be reached by Congress.

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* Letter, Harry S. Truman to Alben W. Barkley, July 9, 1951.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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May 12, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 886

STERLING DRUG INC., *Petitioner*,

v.

FARBENFABRIKEN BAYER A.G., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 251 F. 2d 300 and is also printed as Appendix A to the Petition.[1]

The opinion of the District Court is reported at 148 F. Supp. 733 and is printed as Appendix B to the Petition.

QUESTION PRESENTED

Is a national of the Federal Republic of Germany today entitled to access to the United States courts in a private action to recover property wrongfully appro-

[1] In accordance with the footnote appearing on page 3 of the Petition, Bayer's Appendices in the Court of Appeals are numbered and cited 1a, 2a, 3a, etc. The pages of Sterling's Appendix therein are numbered and cited 1b, 2b, 3b, etc.

priated from it, where the property although subject to seizure during the war, was not seized by the Alien Property Custodian?

RESOLUTION, PROCLAMATION AND TREATIES INVOLVED

This case involves congressional Joint Resolution 289, October 19, 1951, 65 Stat. 451, 50 U.S.C. App. Notes preceding Section 1 (1952 ed.). Its text is as follows:

> "* * * That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

Presidential Proclamation No. 2950, issued pursuant to the Joint Resolution on October 24, 1951, 16 F.R. 10915, 1951 U. S. Code Congressional and Administrative Service p. LXVI, is set forth as Appendix I to this brief.

This case also involves the Agreement Concerning the Treaty Between the United States of America and Germany on Friendship, Commerce and Consular Rights of December 8, 1923, as amended, 5 U.S.T. 1969 (effective 1954), and the Treaty of Friendship, Commerce, and Navigation between the United States and Germany, 7 U.S.T. 1839 (effective 1956).

The pertinent portions of the 1956 Treaty appear as Appendix II to this brief.

STATEMENT OF THE CASE

1. Preliminary

The matters set out in the petition for certiorari under the heading "Statement of the Case", from pages 3 to 12, are for the most part completely immaterial to the issues before this Court. They give the misleading impression that Bayer seeks to enforce performance of contracts which are illegal under the antitrust laws. This is not the position which the respondent will take in the suit. On the contrary, respondent has filed a companion suit against Sterling which charges in effect that Sterling is now using the power, illegally acquired prior to the war, to continue the exclusion of Bayer from the American market. Because respondent does not like to see its position misstated on a public record we have set out, as Appendix III to this brief, our own view of the background of the case and the issues raised in the complaint. It is not included in our brief because we think it irrelevant. This Court cannot appraise a conflict between the petitioner's and the respondent's statements concerning either the background or the merits of the case merely on the basis of the complaint.

The sole ruling of the district court was that respondent because of its so-called enemy status, was disqualified from appearing before an American court. The lower courts here could not and did not pass on any substantive issue.

2. The Relevant Facts

The only facts which are relevant in this Court are the following:

1. Respondent, Farbenfabriken Bayer A.G.,[2] a corporation organized under the laws of the Federal Republic of Germany and engaged in the manufacture and distribution of drugs and pharmaceuticals, filed suit against Sterling Drug, Inc., a Delaware corporation, for an accounting and other relief arising out of the operation of a joint business venture operated by the parties between World War I and World War II in Latin America (App. 3a, 6a-8a, 11a, 12a, 14a; Complaint, ¶¶ 1, 13-20, 41, 42).

2. The claim on which respondent sued was one which arose at least in part prior to World War II. It was thus subject to vesting by the Alien Property Custodian prior to the termination of the vesting program, but the Alien Property Custodian never saw fit to vest or seize it. In these circumstances, prior to a decision on the merits, this Court must assume that Bayer has a valid claim against Sterling, and that Sterling is in wrongful possession of property belonging to Bayer.

---

[2] Farbenfabriken Bayer A.G. is referred to herein as "Bayer" or "Respondent". Sterling and the court below have referred to Bayer as "Farben", a designation which is confusing since it is a name commonly used to apply to I. G. Farbenindustrie A.G. in Liquidation, a predecessor of not only the present company but several of its competitors.

This record, therefore, raises the simple issue of whether Sterling may keep Beyer's property which it unlawfully acquired because Bayer has no access to American courts and cannot maintain a suit.

3. The District Court Opinion

On Sterling's motion, the District Court for the District of New Jersey dismissed the suit on the ground that with respect to the claims alleged Bayer had the "status of an enemy" and was barred from access to the United States courts while that "status" continued (App. B-4). The court was of the opinion that the right to vest or seize German property reserved in the proviso to the Joint Resolution of October 19, 1951 terminating the state of war with Germany, carried with it a disability of Germans to sue in the United States courts to protect such property while it remained subject to an unexercised power of seizure. It held that the choses of action involved herein were still subject to vesting or seizure by the United States and therefore could not be the subject of suit by Bayer against Sterling.

The dismissal ordered by the District Court was stated to be without prejudice to reinstitution of the action "if and when the disqualification incident to the enemy status of the [respondent] is lifted, either by treaty or otherwise, * * *." (App. B-6)

The disqualification found by the court was believed by it not to be a personal disqualification of Bayer. It was based solely on the nature of the claim on which it sued, which the court considered to be still subject to an unexercised power of seizure. In a separate opinion issued the same day in another case in which Bayer sued Sterling under the antitrust laws for an injunc-

tion and damages for Sterling's exclusion of Bayer from the American market in pharmaceuticals, the District Court sustained Bayer's right to access to the court. It distinguished the present case on the ground that the claims involved in the antitrust suit were postwar claims and were therefore not subject to seizure. *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc.*, 148 F. Supp. 738, 739 (1957).

4. Opinion of the Court of Appeals for the Third Circuit

On appeal, the Court of Appeals for the Third Circuit reversed in a unanimous opinion and reinstated the complaint. It held that the Joint Resolution and the ensuing Presidential Proclamation terminating the state of war between Germany and the United States restored Bayer's right to have access to the courts of the United States even while its property for a time remained subject to an unexercised power of vesting or seizure. In the light of this ruling the court found it unnecessary to consider other contentions to the effect that Bayer's property rights were no longer subject to vesting or seizure in consequence of the series of events subsequent to the Joint Resolution of October 19, 1951.[3]

The court held that respondent's right to maintain a suit in the courts of this country was suspended during the Second World War under the "'common law rule,' that the King's subjects had a duty to plunder the King's enemies, subsequently modified to a prohibition, personal to an enemy that *qua* enemy he could not maintain a suit . . ." (App. A-4). The court concluded that, upon the termination of the war by the

[3] These arguments are detailed below under Reason for Denying the Writ at pp. 11-16.

Joint Resolution and the succeeding Proclamation, respondent again became entitled to maintain its suit. The court fully discussed the proviso to the Joint Resolution relied on by petitioner. It stated the reason for the proviso was

> "* * * that it was necessary to retain control of German property already vested and possibly to vest other German property, even though the war had terminated.
>
> "Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies but deemed it necessary to make certain that the President should retain the right to vest certain German property." (App. A-6)

The Court of Appeals therefore held that respondent herein, Farbenfabriken Bayer, a corporation organised under the laws of the Federal Republic of Germany

> "is entitled to maintain its suit and, if the nature of its causes of action and the evidence permit, to secure judgment in the court below." (App. A-8)

The decision is thus interlocutory. As the court below recognised, Bayer ultimately "may not secure a judgment against Sterling." (App. A-8). Sterling is merely required to defend on the merits in the District Court the charge that it improperly misappropriated its partner's assets entrusted to it.

REASONS FOR DENYING THE WRIT

Sterling's petition for a writ of certiorari should be denied for the following reasons:

1. The question presented has no public importance. It does not affect any substantive rights of the Government to retain property vested by the Alien Property Custodian. All the decision does is to permit a German national to bring a private suit to recover property which has never been vested and cannot now be vested, which property has been wrongfully appropriated by an American corporation.

2. There is no conflict with any other Circuit.

3. The decision of the court below is plainly correct and no issues justifying review by this Court are presented by it.

A. The Question Presented Has No Public Importance

Sterling's sole ground for claiming the public importance of the issue here is stated on page 12 of the Petition as follows:

> "If the decision below is allowed to stand, it will nullify the effectiveness of the extensive program of vesting and seizure of enemy assets carried on by the United States Alien Property Custodian under the provisions of the Trading With the Enemy Act."

Petitioner contends that "(b)y this decision, the Court of Appeals for the Third Circuit has opened American courts and indeed invited the filing therein of law suits against the Attorney General for the re-

turn of every piece of vested property (or the equivalent)". (Pet. p. 13)

There is no basis for this contention as the opinion below clearly shows. The Court of Appeals specifically stated that the Joint Resolution terminating the state of war with Germany was designed to permit the Executive "to retain control of German property already vested and possibly to vest other German property." (App. A-6) Nevertheless, Sterling argues that this decision, which interpreted the Joint Resolution as preserving the Government's power to "retain control of" vested German property, must be interpreted as requiring exactly the contrary, i.e., the return of vested German assets to German nationals.

So far as free access to the courts is concerned a German national has every right that an American has to bring a suit against a private individual as in the case here. So far as suits against the Government are concerned he may of course bring them only if the Government has consented to be sued. He cannot bring suit against the Attorney General for return of property because, under Section 9(a) of the Trading With the Enemy Act, 50 U.S.C. App. § 9(a), as construed by the courts, the Government has not consented to be sued by German corporations for the return of property seized. Such consent is given by statute only to persons not wartime enemies (which term includes by definition companies incorporated in Germany, 50 U.S.C App. § 2). *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42, 44 (1925). In addition there is a coterminous specific statutory ban against return of vested property to German nationals, 50

U.S.C. App. § 39, discussed in *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952).[4]

The distinction between general access to the courts in suits against private parties and special consent to sue the Government was clearly recognized by the court below. It interpreted the 1951 Joint Resolution as allowing the present private suit while at the same time expressly preserving to the Executive the right "to retain control of German property already vested and possibly to vest other German property". (App. A-6)

B. There Is No Conflict With Any Other Circuit

It is only by first making the untenable argument to the effect that the Court of Appeals decision permits the return of vested property to German nationals that Sterling can assert the existence of a conflict with the decisions of other federal courts. As evidence of this supposed conflict, Sterling cites (Pet., p. 22) a number of decisions in which German nationals or others were held not entitled to have vested property returned to them under the Trading With the Enemy Act. But these cases are not based on any general exclusion of German nationals from access to the courts. They are based on the clear ground that the

---

[4] The Section beings as follows:

"(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this [Trading With the Enemy] Act, shall be returned to the former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. * * *"

Government has not consented to be sued for the return of vested property in such cases.[5]

As pointed out above, the decision of the court below would not permit Bayer, or any other German corporation to secure the return of vested property from the United States by suit under the Trading With the Enemy Act. The Government has not consented to be sued by wartime enemies. *Swiss National Insurance Co.* v. *Miller, supra.* The court below expressly stated that the Joint Resolution terminating the state of war which restored Bayer's right of access to the courts also continued the Government's right "to retain control of German property already vested".

The Joint Resolution merely removed respondent's common law disbarment from all access to the courts which existed during the state of war. It allowed suit against private parties without in any way broadening the scope of the statutory limitations on the right to sue the sovereign for return of vested property. The ruling below thus does not conflict with the ruling of the other federal courts cited in the Petition.[6]

C. The Decision Below Is Plainly Correct and No Issue Justifying Review by This Court Is Presented by It

We cannot add to the clear and convincing reasons given by the Court of Appeals in support of its conclusion that the joint resolution was not intended to

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[5] E.g., *Central National Bank* v. *Brownell*, 137 F. Supp. 686 (N.D. Ohio, 1956), cited by petitioner, states: "Since this is a suit against the United States it can be maintained only after the Government has consented to be sued."

[6] Petitioners is driven to try to make something of a one paragraph lower New York state court opinion which is quoted *in toto* at page 23 of the Petition.

permit a wrongdoer to appropriate and confiscate invested property of Germans after the vesting program had ended.

However, if the opinion of the Court of Appeals remanding the case for trial be questioned, additional grounds urged by respondent, but not reached by the court below, again become relevant.

These points urged by respondent below establish that even if the continued right to vest property on the part of the Government after October 19, 1951 prohibited litigation by German nationals, that right of seizure has long since been terminated. The Joint Resolution preserved the right to vest German property only as incident to the termination of the vesting program. This program came to an end with a Presidential announcement of April 17, 1953 embodied shortly thereafter in a licensing order. Legislative sanctions for vesting were removed by the terms of the interim Treaty of Friendship, Commerce and Consular Rights between the United States and Germany effective 1954, 5 U.S.T. 1939, and the full Treaty of Friendship, Commerce and Navigation between the United States and Germany which became effective in 1956 and superseded the earlier treaty. 7 U.S.T. 1839. These Treaties guarantee German nationals protection against seizure of their property without just compensation. The issues are briefly discussed here.

1. On April 17, 1953, on the occasion of German Chancellor Adenauer's visit to the United States, the White House announced the termination of the program for vesting German-owned property located in the United States. 28 State Department Bulletin 720, 721 (May 18, 1953). In the same announcement the Attorney General stated that no orders would be

issued vesting additional German properties. The Secretary of State declared that the measure was a step to the closer development of normal international relations between the United States and Germany.

2. Once the President had determined not to vest any additional German properties, there was no further reason for blocking transactions in these properties, since the purpose of blocking transactions was primarily to aid the vesting program. Annual Report, Office of Alien Property Custodian, Department of Justice, p. 1 (1953). Accordingly, within a few months, on June 24, 1953, License 101, 18 F.R. 3687, 8 C.F.R. § 511.101a (1958 Rev.), was issued. This general license released all German property from blocking except property which had been seized and property which was held in Iron Curtain countries.

The pertinent portion of General License 101 provides:

> "* * * *a general license is hereby granted licensing all property now blocked under the order to be regarded as property in which no blocked country or national thereof has, or has had, any interest.*" 18 F.R. 3687, 8 C.F.R. § 511.101a (1958 Rev.).

The license thus declared that German property located in this country prior to January 1, 1947, should henceforth be regarded as property in which no blocked national "has, or has had, any interest". It made such property fully as free as any other property. Accordingly, General License 101 removed the application of General Ruling 11-A, 12 F.R. 1458 (March 4, 1947), 8 C.F.R. § 511.211a (1958 Rev.), which had forbidden German nationals to "deal in" or "exercise any rights, powers or privileges" involving property located in

the United States on or before December 31, 1946
License 101 covered the claims involved in this suit
and authorized all transfers or dealing in those claims
Plainly, it also authorized litigation to protect those
claims.

3. A Treaty of Friendship, Commerce and Naviga-
tion between the United States and Germany was
signed on October 29, 1954, and became effective on
July 14, 1956. 7 U.S.T. 1839. This Treaty superse-
ded a 1954 interim Treaty of Friendship between
the two countries, the two treaties being similar in
effect. Both treaties prohibited taking of German
property without just compensation. See 7 U.S.T.
1839, 1844, Art. V, § 4; 5 U.S.T. 1939, 1941, Art.
incorporating by reference, 44 Stat. 2132, 2134 (1923
Art. I, 14.

Sections 1 and 4 of Article V of the 1956 Treat
provide:

> "1. Property of nationals and companies
> either Party shall receive the most constant pro-
> tection and security within the territories of th
> other Party.
>
> • • • • • • • •
>
> "4. *Property of nationals and companies*
> *either Party shall not be taken within the terr*
> *tories of the other Party, except for the publi*
> *benefit and in accordance with due process of la*
> *nor shall it be taken without just compensatio*
> Such compensation shall represent the equivale
> of the property taken and shall be made in a
> effectively realizable form and without unnecessa
> delay. Adequate provision shall have been ma
> at latest by the time of the taking for the dete
> mination and the giving of the compensation
> (Emphasis supplied) 7 U.S.T. at 1844

It is difficult to imagine a clearer and more forceful prohibition against the seizure or vesting of German property than that contained in Article V, § 4 of the Treaty. Under the Trading With the Enemy Act, of course, vested property of German nationals was confiscated. The Government is expressly forbidden to "pay compensation" for such property. 62 Stat. 1246 (1948), 50 U.S.C. App. § 39 (1952 ed.).[1] *Per contra*, under the Treaty just compensation is required and provision for it must be made by the time of the taking, and property may be taken only for public benefit and in accordance with due process of law. Art. V, § 4.

The 1954 Treaty was made prospective in operation so that the ban on confiscation would not affect the right of the United States Government to retain property previously vested under the Trading With the Enemy Act. Art I, 5 U.S.T. 1941. See "Commercial Treaties", Hearings before Subcommittee of the Committee on Foreign Relations United States Senate, 83rd Cong., 1st Sess. p. 19 (1953).

Article VI of the 1956 Treaty (See Appendix II, *infra*) constitutes a solemn undertaking on the part of the United States to accord the citizens of a friendly nation access to the courts of the United States and the utmost protection of their private property. Such an undertaking should of course be implemented by the federal courts. The language of the Treaty is clear and is directly opposed to the position which Sterling would have this Court adopt.

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[1] Text quoted p. 10, n. 4 *supra*.

The Treaties and the Presidential announcement referred to above demonstrate that even if the right to vest respondent's property was for a time a bar to the presentation of its claim (which is not the case), the right to vest has now been terminated and any consequent disability removed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX I

Presidential Proclamation No. 2909, Issued October 24, 1951, 16 F.R. 10813, 1951 U.S. Code Congressional and Administrative Service p. LXVI

"WHEREAS, by a joint resolution, approved by the President on December 11, 1941, the Congress of the United States formally declared a state of war to exist between the United States and the Government of Germany (55 Stat. 796); and

WHEREAS on December 31, 1946, the President proclaimed the cessation of hostilities of World War II; and

WHEREAS it has been and continues to be the policy of the United States to bring about the conclusion of a treaty of peace with the government of a united and free Germany, but efforts to this end have been frustrated and made impossible for the time being by the policy of the Soviet Government; and

WHEREAS it has nevertheless been considered desirable to bring the existing state of war with Germany to a close and to remove Germany from its present enemy status, thus eliminating certain disabilities affecting German nationals; and

WHEREAS the rights, privileges, and status of the United States and the other occupation powers in Germany, and the rights and privileges of the United States and its nationals to which it or they have become entitled as a result of the war, as well as the right to exercise or enforce the same, derive from the conquest of Germany and the assumption of supreme authority by the Allies and are not affected by the termination of the state of war; and

WHEREAS the Congress of the United States by a joint resolution, approved October 19, 1951 (Public Law 181, 82d Congress), has resolved that the state of war declared to exist between the United States and the Government of

Germany is terminated and that such termination shall take effect on the date of enactment of such resolution;

Now, Therefore, I, Harry S. Truman, President of the United States of America, pursuant to such joint resolution, do proclaim that the state of war between the United States and the Government of Germany declared by the joint resolution of Congress approved December 11, 1941 was terminated on October 19, 1951."

APPENDIX II

Treaty of Friendship, Commerce, and Navigation Between the United States and Germany, 7 U.S.T. 1839 (Effective 1956)

"The United States of America and the Federal Republic of Germany desirous of strengthening the bonds of friendship existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce, and Navigation, based in general upon the principles of national and of unconditional most-favored-nation treatment reciprocally accorded, and for that purpose have appointed as their Plenipotentiaries:

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Article I

1. Each party shall at all times accord fair and equitable treatment to the nationals and companies of the other party, and to their property, enterprises, and other interests.

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ARTICLE V

1. Property of nationals and companies of either party shall receive the most constant protection and security within the territories of the other party.

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4. Property of nationals and companies of either party shall not be taken within the territories of the other party, except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation. Such compensation shall represent the equivalent of the property taken and shall be made in an effectively realizable form and without unnecessary delay. Adequate provision shall have been made at latest by the time of the taking for the determination and the giving of the compensation.

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ARTICLE VI

1. Nationals and companies of either party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either party not engaged in activities within the territories of the other party shall enjoy such access therein without any requirement of registration or domestication."

APPENDIX III

Analysis of the Complaint

The petition for certiorari contains recitations of assumed facts contrary to the allegations of the complaint before the court.

Among the many allegations contained in the petition (Pet. 8-11) is a long and misleading history of the negotiations leading to a consent decree against Sterling in

1941. There is also a misinterpretation of some of the documents contained in certain 1923 agreements irrelevant to the present matter but involved in another lawsuit between the parties (Pet. 6-8). These statements are apparently designed to create the impression that Sterling was an innocent victim of a powerful German corporation engaged in "cartel activity" as a result of which it was severely limited in competition abroad. As appears from the companion suit now pending in the New Jersey Federal District Court, the shoe is on the other foot. There Bayer seeks an injunction and damages under the antitrust laws against Sterling for illegally excluding Bayer from the American pharmaceutical market under a conspiracy originating after World War I and continuing to the present time. It is there alleged that it was the German concern that was weak as a result of the economic situation in Germany after World War I and was imposed upon by the trademark piracy of Sterling. It is further alleged that the 1923 agreement limited Bayer and not Sterling. We shall not burden this brief with recounting the many respects in which Sterling departs from the issue, but shall merely recite the allegations of the complaint before the court on this petition.

In its complaint here Bayer alleges that in 1895 its predecessor formed a subsidiary company in the United States and, later other subsidiaries in Latin America, which sold various products of which the best known was Bayer Aspirin (App. 4a, 5a; Complaint, ¶¶ 7-9). During the first World War the United States Alien Property Custodian seized assets of Bayer's predecessor in the United States and sold them to a predecessor of the petitioner (App. 5a; Complaint, ¶ 10). Sterling thereby acquired the Bayer trademark in the United States, and, taking advantage of Bayer's weak and defenseless position as a result of the defeat of Germany in World War I, succeeded in improperly obtaining for itself the registration of Bayer trademarks in some countries of Latin

America (App. 5a, 6a; Complaint, ¶ 12). The strong bargaining position thus obtained by Sterling enabled it to force Bayer to sign a contract for a joint enterprise in Latin America covering the sale of Aspirin and Aspirin products in which Sterling was to receive 25 per cent of the profits of a business which had previously belonged exclusively to Bayer. This agreement was signed in 1920 and was to run for fifty years. The agreement continued to be performed on both sides through the years between the two World Wars (App. 6a-8a; Complaint, ¶¶ 13-18).

After the outbreak of World War II, but prior to the United States' entry into the conflict, Sterling appropriated to itself the entire joint business. It is out of this breach of trust by Sterling in violation of its obligations to its partner that the present causes of action arise (App. 8a; Complaint, ¶¶ 18, 19).

The claims of respondent set forth in the complaint were never vested by the Alien Property Custodian (App. 8a, 10a; Complaint, ¶¶ 20, 27).

The causes of action pleaded may be briefly summarized as follows:

(1) In 1941 the United States and Germany were not at war and Sterling continued to perform under the contract. However, it made no accounting or payment of the profits of the joint enterprise. Also, some payments on account of 1940 were not made (App. 8a; Complaint, ¶ 18).

The funds were not vested by the Alien Property Custodian (App. 8a, 10a; Complaint, ¶¶ 20, 27).

Respondent prays for an accounting of the profits of the joint Latin American business under the 1920 contract for the years 1940 and 1941 (App. 8a).

(2) In 1941 Sterling embarked upon a plan to appropriate to itself the Latin American Aspirin market and to

exclude Bayer. Using the good will, distribution methods and other valuable assets of the joint enterprise Sterling introduced into the Latin American market a substitute Aspirin product, by which it succeeded in taking over 100 per cent of the business of the joint enterprise. Respondent's own funds were used to further this scheme. Sterling also took steps to obtain control of the Bayer trademarks not for use but only to bar respondent from returning to the Latin American market after the war (App. 10a; Complaint, ¶ 26). After the war when commercial relations between United States and German companies were again possible, Sterling refused to grant Bayer any payment in respect of the business created with the funds and good will of the joint enterprise or to make any accounting concerning the joint enterprise. Respondent alleges that Sterling is by reason of its actions trustee of the business in Aspirin and Aspirin products it now conducts in Latin America.

This claim was not vested by the Alien Property Custodian.

Respondent prays the Court to declare Sterling a trustee and to require Sterling to account to respondent with respect to said business (App. 8a-11a; Complaint, ¶¶ 21-30).

The respondent has no desire to resume the old partnership. The present action is in the nature of an accounting on the dissolution of the partnership. In September 1941 Sterling, without notice to respondent, consented to a decree with the Department of Justice under the antitrust laws under which it was enjoined from performing a number of contracts, including the Latin American Aspirin contract of 1920. The present claims for an accounting are justified irrespective of the legality or illegality under the antitrust laws of the old partnership between the parties in Latin America.